Supreme Court of the United States

OCTOBER TERM, 1967

No. 85

UNITED STATES, APPELLANT

vs.

CHARLES JACKSON, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. 11829

(Title 18, U.S.C. 1201(a) and Title 18, U.S.C. 2312)

[File Endorsement Omitted]

UNITED STATES OF AMERICA

v.

CHARLES JACKSON, also known as "Batman", also known as "Butch"; GLENN WALTER ALEXANDER DE LA MOTTE; and JOHN ALBERT WALSH, JR.

INDICTMENT—Filed October 10, 1966

THE GRAND JURY CHARGES:

COUNT ONE

On or about September 2, 1966, CHARLES JACKSON, also known as "Batman", also known as "Butch"; GLENN WALTER ALEXANDER DE LA MOTTE; and JOHN ALBERT WALSH, JR., the defendants herein, did knowingly transport in interstate commerce from Milford in the District of Connecticut to Alpine, New Jersey, one John Joseph Grant, III, a person who had theretofore been unlawfully seized, kidnapped, carried away and held by the defendants herein, for ransom and reward and for the purpose of aiding the said defendants to escape arrest, and the said John Joseph Grant, III, was harmed when liberated, in violation of Title 18, United States Code, Section 1201(a).

COUNT TWO

On or about September 2, 1966, CHARLES JACKSON, also known as "Batman", also known as "Butch"; GLENN

WALTER ALEXANDER DE LA MOTTE; and JOHN ALBERT WALSH, JR., the defendants herein, did transport a stolen motor vehicle, that is a tractor, 1955 MAC model B42, Vehicle Identification Number B42T-5591, from Milford in the District of Connecticut to New York City, New York, and they then knew the motor vehicle to have been stolen, in violation of Title 18, United States Code, Section 2312.

A TRUE BILL

/s/ [Illegible]
Foreman

JON O. NEWMAN
United States Attorney

By: /s/ Samuel J. Heyman
SAMUEL J. HEYMAN
Assistant United States Attorney

[fol. 2]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. 11,829

[File Endorsement Omitted]

UNITED STATES OF AMERICA

v.

CHARLES JACKSON

BILL OF PARTICULARS—Filed November 14, 1966

To the extent of the Government's information, the Government replies to Motion of defendant, CHARLES JACKSON, for Bill of Particulars as follows:

1. The Government has no information with which to answer.
2. JOHN JOSEPH GRANT, III, suffered lacerations of the wrist, hands, and arms.
3. JOHN JOSEPH GRANT, III, liberated himself on September 2, 1966.

JON O. NEWMAN
United States Attorney

By: /s/ Samuel J. Heyman
SAMUEL J. HEYMAN
Assistant United States Attorney

[Certificate of service omitted in printing]

SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1967

No. 85

UNITED STATES, APPELLANT

vs.

CHARLES JACKSON, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

FILED APRIL 7, 1967
PROBABLE JURISDICTION NOTED MAY 29, 1967

[fol. 5]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. 11,829

[File Endorsement Omitted]

UNITED STATES OF AMERICA

v.

CHARLES JACKSON

11/16/66

Motion continued to 11/28/66 upon the condition said motion will be heard on its merits on that date.

/s/ W.H.T.
Chief Judge

MOTION TO DISMISS THE INDICTMENT—
Filed November 4, 1966

The defendant moves the court for an order directing the United States of America to dismiss the indictment against him. He claims the indictment incorporates, or purports to incorporate, the elements of a penal statute specifying a Federal Crime, Title 18, Section 1201, which statute is unconstitutional. If convicted as charged, the defendant will stand in violation of a statute which is defective in that it is a capital penal statute which fails to set up ascertainable standards of guilt. Being a statute allowing capital punishment, it is even more important that there be no ambiguity in its wording.

The element of the statute specifying "ramson or reward *or otherwise*" is patently ambiguous and indefinite. A statute so vague and indefinite as to fail to give fair notice of what acts will be punished violates an accused's

rights under procedural due process. *Winters* v. *New York*, 333 U.S. 507,1948.

The Defendant, CHARLES JACKSON

By /s/ Stephen I. Traub, Esq.
152 Temple Street
New Haven, Connecticut

[Certificate of service omitted in printing]

[fol. 6]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. 11,829

[File Endorsement Omitted]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOHN ALBERT WALSH, JR., DEFENDANT

11/16/66

Motion continued to 11/28/66 upon the condition said motion will be heard on its merits on that date.

/s/ W.H.T.
Chief Judge

MOTION TO DISMISS INDICTMENT—
Filed November 4, 1966

The defendant Walsh in the above captioned case hereby moves that the court order the above indictment dismissed as it charges an offense under a statute which is uncon-

stitutionally vague, in that it fails, by use of the words "ransom or reward *or otherwise*", to notify properly a potential defendant exactly what conduct is proscribed and criminal. This, especially in a statute charging a capital offense, is constitutionally impermissible.

The Defendant JOHN A. WALSH, JR.

By: /s/ Ira B. Grudberg
JACOBS, JACOBS, JACOBS & JACOBS
207 Orange Street
New Haven, Connecticut

[Certificate of service omitted in printing]

[fol. 8]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. 11,829

[File Endorsement Omitted]

UNITED STATES OF AMERICA

vs.

CHARLES JACKSON

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS INDICTMENT—Filed November 23, 1966

On November 3, 1966, the defendant Charles Jackson moved this court to dismiss the indictment against him. This memorandum is in support of that motion.

1. *The indictment is invalid and should be quashed because the statute on which it is based puts the defendant to an unconstitutional choice, rendering it impossible for him to enter a voluntary plea of guilty or to plead not guilty without paying a heavy price.*

18 U.S.C. § 1201 authorizes the death penalty if the kidnapped person has not been liberated unharmed, and "*if the verdict of the jury shall so recommend*" (emph. supp.). The statute plainly proscribes the death penalty if the defendant pleads guilty, for there is then no jury to recommend death. See *Waley* v. *United States*, 233 F.2d 804, 806 (9th Cir. 1956). Therefore, only a defendant who insists on his right to a trial by pleading not guilty risks his life. One punishment is permissible for those who plead innocent; a lesser penalty for those who plead guilty. The statute coerces a guilty plea and imposes a price on the exercise of the Constitutional right to a jury trial. It makes impossible a truly voluntary plea to the indictment. It is therefore a deprivation of Due Process and unconstitutional on its face. If comment on a claim of privilege is unconstitutional because it "cuts down on

the [self-incrimination] privilege by making its assertion costly", as the Supreme Court held in *Griffin* v. *California*, 380 U.S. 609, 615 (1965), it is no less unconstitutional to [fol. 9] cut down on the right to a jury trial by making its exercise costly. See *United States* v. *Wiley*, 278 F. 2d 500 (7th Cir. 1960) (reversing sentence where trial judge punished defendant more harshly for standing trial than if he had plead guilty. Held: Unlawful to punish a person for standing on his right to a trial.)

2. *The indictment should be dismissed because the statute on which it is based authorizes "cruel and unusual punishment" contrary to the 8th Amendment, and violates the Due Process Clause of the Fifth Amendment.*

The statute invoked here authorizes infliction of the death penalty, upon recommendation of the jury, on anyone who unlawfully takes another person across a state line against his will, if the abducted person is not "liberated unharmed," and if the motive of the defendant was "ransom or reward or otherwise." 18 U.S.C. § 1201. Contrary to the basic doctrine of statutory interpretation, *ejusdem generis*, and in derogation of the duty to construe penal statutes narrowly, the courts have construed the term, "otherwise" to encompass not only pecuniary motives, as indicated by the specific terms which the word follows, but to comprehend any motive whatsoever. *Gooch* v. *United States*, 297 U.S. 124 (1935); *United States* v. *Martell*, 335 F.2d 764 (4th Cir. 1964). Indeed, the Supreme Court has recently said that the crime of kidnapping may be committed by one who transports another involuntarily across state lines for a *lawful* purpose. *United States* v. *Healy*, 376 U.S. 75 (1964). Moreover, there have as yet been no decisions restricting the possible scope of the vague concept, "liberated unharmed." See *Robinson* v. *United States*, 324 U.S. 282 (1944).

If the statute is thus broadly interpreted, it would authorize capital punishment for trivial offenses; a fraternity prank resulting in minor accidental injury; an unlawful arrest by law enforcement officers who take their arrestee across state lines and injure him in the process. Even if construed more narrowly, as it should be, the stat- [fol. 10] ute authorizes death for offenses which are in

essence no more than robberies. Human life need be neither taken nor seriously threatened in order to fit all conditions of the statute.

The statute therefore authorizes a penalty so grossly disproportionate to the gravity of the offense which it proscribes as to fall within the ban on "cruel and unusual punishments" and to deny due process of law.

Although decisions are rare in which grossly excessive penalties have been held constitutionally impermissible, this is due to the fact that such penalties are rarely either imposed or authorized. There are countless other crimes more serious and more harmful to society than most of the conduct covered by § 1201, in which the death penalty is withheld, *e.g.*, second degree murder (18 U.S.C. § 1111), piracy (18 U.S.C. § 1651), attempted assassination of the President (18 U.S.C. § 1751). Nonetheless, when a penalty is grossly disproportionate to the offense to which it applies, it is "cruel and unusual." *Weems* v. *United States*, 217 U.S. 349 (1909). See also, *Robinson* v. *California*, 370 U.S. 660 (1962); *Trop* v. *Dulles*, 356 U.S. 86 (1958); *Rudolph* v. *Alabama*, 375 U.S. 889-91 (1963) (Opinion of Mr. Justice Goldberg, dissenting from denial of *certiorari*). And when the penalty is so excessive as to violate "evolving standards of decency" (*Trop* v. *Dulles*, *supra*, at 101), it also violates the Fifth Amendment.

We do not contend that the death penalty cannot be imposed for kidnapping for ransom coupled with intentional, substantial bodily injury. But the statute covers much more. Neither a ransom motive or an intentionally infliction of serious injury is required, despite the fact that these were the evils at which the statute was aimed. See Fisher & Maguire, *Kidnapping and the So-Called Lindbergh Law*, 12 N.Y.U. L. Rev. 646 (1935); Bomar, *The Lindbergh Law*, 1 Law & Contemp. Prob. 435 (1934). The general class of conduct comprehended by the statute includes the trivial as well as the terrible, the miniscule as well as the momentous. As such, the statute cannot [fol. 11] stand. The only way in which the penalty can avoid offending basic civilized, standards of decency is to be narrowly interpreted, so as to require a ransom motive and willful, serious injury. If the statute is so construed,

the indictment should be dismissed for failure to state an offense, for, as appears in other motions and memoranda, the only motive properly alleged here is one to evade arrest, and the only harm alleged is rope burns inflicted, so far as appears, by the victim in attempting to free himself.

3. *The statute on which the indictment is based is void for vagueness*

"A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application, violates the first essential of due process . . ." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). "The terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Vanzetta* v. *New Jersey*, 306 U.S. 451 (1939). The federal kidnapping statute is therefore unconstitutionally vague and indefinite.

As noted, *supra*, the Courts have read the qualification, "ransom or reward or otherwise" out of the statute. The motive of the kidnapper is irrelevant. Indeed, the failure of the prosecution to allege anything about the purpose or motive of the abduction has been held permissible. *United States* v. *Parker*, 103 F.2d 857 (3d Cir. 1939), *cert. den.*, 307 U.S. 642 (1939); *Hayes* v. *United States*, 296 F.2d 657 (8th Cir. 1961), *cert. den.*, 369 U.S. 867 (1962). We think such cases are wrong. Not only do they ignore the canon of *ejusdem generis*, the principle of strict interpretation of penal statutes, and the history of the legislation in question, they convert a petty offense into a grievous one, and give prosecutor and the jury an ocean of discretion in which to play with people's lives and freedom. A statute which makes a capital offense of a fra-
[fol. 12] ternity prank or a false arrest (see *supra*) is no statute at all; it is an abdication of legislative responsibility and a derogation of democratic principles. It leaves lives and freedom to the whims of juries and makes a mockery of the rule of law. Congress did not intend its statute to be so broad, but if, as the courts suggest, it did, then the statute is an unconstitutional effort to transfer

from elected representatives to each individual jury the power of life and death over the citizen. Such a statute not only violates the principle of legality, it is fundamentally unfair in making it impossible for one to know in advance of the jury's decision whether he has committed the crime or not.

Making motive irrelevant to the crime of kidnapping is not the only vice of the statute. The phrase "liberated unharmed" is also a citadel of impenetrable ambiguity. Yet if one guesses wrong about the meaning which will be given to the phrase, it may cost him his life. In *Robinson* v. *California*, 324 U.S. 282 (1944), where the Court rejected an argument that the phrase was unconstitutionally vague (but the Constitutional basis of the defect had apparently not been advanced) on the ground that the statute was clearly applicable to the defendant's conduct (which is not the case here), the ambiguities of the phrase were well noted by Mr. Justice Rutledge:

> "What does 'liberated unharmed' mean? . . . What act is pointed to by 'liberated'? Does it refer only to release by the kidnapper or does it include a case of rescue overcoming his will and purpose? Does it cover his abandonment of the victim in flight, leaving him perhaps gagged and bound in some lonely spot or cell, not free but no longer in the kidnapper's power? Or must he, before the pressures become too great, change his mind, exercise discretion and set the victim free before he is forced to do so?
>
> "Similarly, what is 'unharmed'? A scratch, a cut, abrasions left by removal of tape or rope, bruises, nervous shock, disturbance of digestion, all of a kind which heals or passes before 'liberation' occurs? Few kidnappings take place without harm of some kind to the victim. . . . One produces traumatic injury, from minor abrasion to death, the other nervous or mental shock of momentary or lifetime duration. How much injury, and what kind, did Congress have in mind?
>
> [fol. 13] ". . . . Whether Congress meant all injuries, slight, substantial, serious or permanent, or only some

> of these, the statute does not say and the legislative history gives no guide. The judge, or the jury, or both together not only must apply, they must determine and write the law in this respect, until at any rate this Court, equally without legislative guidance, tells them what Congress had in mind.
>
> "There are still other uncertainties. Was it the intent (1) that the kidnapper must both liberate and refrain from injuries his victim or (2) merely that he must not inflict harm, however the liberation may occur? . . . . *Id.* at 287-288 (dissenting opinion)

Mr. Justice Rutledge concluded that "the statute turns the power to impose the death penalty upon facts so vaguely defined that only judicial legislation can remedy the defect . . . . Congress' mandate in such matters must be clear; otherwise we, not Congress, decide." *Id.* at 293. We submit that the dissent in *Robinson*, which was not, it should be noted, squarely opposed by the majority's decision, is the law today. Even if it is not, however, its analysis of the phrase, "liberated unharmed" remains cogent.

The Supreme Court in *Robinson* avoided deciding the question of permissible vagueness, so its decision does not foreclose this court's conclusion that the phrase "liberated unharmed" is unconstitutionally vague. Moreover, no court anywhere, so far as our research discloses, has been asked to decide whether the phrase "ransom, or reward or otherwise" meets Constitutional requirements of clarity. We submit that it does not. We further submit that the vagueness of the one phrase, "otherwise", in its interaction with the other, "liberated unharmed", multiplies the inherent vagueness of each. One phrase alone in a penal statute might conceivably pass muster. Both in the same statute cannot. Since a penal statute is invalid unless it contains "ascertainable standards of guilt," and because "men of common intelligence cannot be required to guess at [its] meaning," *Winters* v. *New York*, 333 U.S. 507 (1948), § 1201 is unconstitutional.

For the foregoing reasons, it is respectfully urged that the court dismiss the indictment insofar as it charges a violation of 18 U.S.C. § 1201.

[fol. 14]

The Defendant, CHARLES JACKSON

By /s/ Stephen I. Traub, Esq.
152 Temple Street
New Haven, Connecticut

By /s/ Steven B. Duke, Esq.
Yale Law School
New Haven, Connecticut

[Certificate of service omitted in printing]

[fol. 16]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. 11,829

[File Endorsement Omitted]

UNITED STATES OF AMERICA

v.

JOHN ALBERT WALSH, JR.

BILL OF PARTICULARS—Filed December 9, 1966

To the extent of the Government's information, the Government replies to Motion of defendant, JOHN ALBERT WALSH, JR., for Bill of Particulars as follows:

1. Evidence for the Government will show that JOHN ALBERT WALSH, JR. and his codefendants held John Joseph Grant III in order to escape arrest; as to whether John Joseph Grant III was also held for "ransom and reward", the Government has no evidentiary proof at this time.

2a. John Joseph Grant liberated himself at approximately 4:30 P.M. on September 2, 1966.

2b. in a wooded area approximately 1½ miles north of Closter Dock Road on Route 9W, near utility pole number 20250 in Alpine, New Jersey.

2c. John Joseph Grant III liberated himself.

3a. John Joseph Grant III suffered rope burns and lacerations of both of his wrists.

3b. Grant suffered the rope burns and lacerations of both wrists while his arms were being tied around a tree, and also in his efforts to liberate himself at approximately 4:30 P.M., on September 2, 1966, in Alpine, New Jersey.

3c. in a wooded area approximately 1½ miles north of Closter Dock Road on Route 9W, near utility pole number 20250 in Alpine, New Jersey.

[fol. 17] 3d. Charles Jackson tied Grant's arms around a tree with a rope.

UNITED STATES OF AMERICA

JON. O. NEWMAN
United States Attorney

By: /s/ Robert D. Glass
Assistant United States
Attorney

[Certificate of service omitted in printing]

[fol.18]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. 11,829

[File Endorsement Omitted]

UNITED STATES OF AMERICA

vs.

CHARLES JACKSON, also known as "Batman", also known as "Butch"; GLENN WALTER ALEXANDER DE LA MOTTE; and JOHN ALBERT WALSH, JR.

APPEARANCES

JON O. NEWMAN, U. S. Atty., Hartford, Conn., SAMUEL J. HEYMAN, Asst. U. S. Atty., New Haven, Conn., and ROBERT D. GLASS, Asst. U. S. Atty., New Haven, Conn., for the United States.

STEPHEN I. TRAUB, of LYNCH & TRAUB, New Haven, Conn., and STEVEN B. DUKE, Yale Law School, New Haven, Conn., court-appointed counsel for defendant Jackson.

IRA B. GRUDBERG, of JACOBS, JACOBS, JACOBS & JACOBS, New Haven, Conn., for defendant Walsh.

ARNOLD M. STEIN, of STEIN & EINHORN, Denville, N. J., and RAYMOND A. BROWN, Jersey City, N. J., for defendant De La Motte.

MEMORANDUM OF DECISION, ORDER AND JUDGMENT GRANTING DEFENDANTS' MOTIONS TO DISMISS COUNT ONE OF INDICTMENT—January 9, 1967

Defendants' motions to dismiss count one of the indictment, pursuant to Rule 12, Fed. R. Crim. P., made before entry of pleas, present what the Court believes to be a substantial question as to whether 18 U.S.C. § 1201(a), a part of the Federal Kidnaping Act, is unconstitutional.

[fol. 19] to the extent that it impairs defendants' free exercise of their Sixth Amendment right to trial by jury.

The Court holds that the section of the statute here applicable to defendants who are about to be put to plea thereunder does violate their Sixth Amendment right. Accordingly, defendants' motions to dismiss count one of the indictment are granted, subject to the stay of proceedings hereinafter provided to permit the United States to appeal directly to the Supreme Court of the United States.

INDICTMENT

The indictment, returned by a grand jury in the District of Connecticut on October 10, 1966, charges each of the three named defendants with two counts. Count one charges that on or about September 2, 1966, defendants transported from Milford, Connecticut, to Alpine, New Jersey, one John Joseph Grant, III, the kidnaped victim, who was harmed when liberated, in violation of 18 U.S.C. § 1201(a). Count two charges that on or about September 2, 1966 defendants transported a stolen motor vehicle from Milford, Connecticut, to New York City, in violation of 18 U.S.C. § 2312.[1]

[fol. 20] STATUTE

Count one of the indictment is founded upon 18 U.S.C. § 1201(a), which provides in pertinent part as follows:

> "Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully seized, . . . kidnaped, . . . or carried away and held for ransom or reward or otherwise, . . . *shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the*

[1] Although counsel for defendants Jackson and Walsh have filed motions "to dismiss the indictment", in neither their motions, briefs nor oral arguments have they challenged count two in any respect. Counsel for defendant De La Motte, although not having filed any motion or brief, at the hearing on the motions by the other defendants, generally adopted the arguments made by counsel for the other defendants.

jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed." (Emphasis added)

This statute creates an offense which calls for capital punishment upon recommendation of the jury, if proof of harm is introduced at the trial.[2] That the government intends to prove harm in the instant case is clearly indicated by the language of count one,[3] which charges that the kidnaped victim "was harmed when liberated". Imposition of the death penalty turns upon the jury's recommendation. Under the terms of the statute, the death penalty may be imposed *only* if the jury so recommends. On the other hand, a recommendation by the jury makes the death penalty *mandatory*.

[fol. 21] If defendants claim their fundamental Sixth Amendment right to trial by jury, therefore, they must risk their lives. That risk is at least substantially reduced if defendants waive their constitutional right to jury trial by claiming trial to the court[4] or by pleading guilty. In the event of a guilty plea, it has been suggested that imposition of the death penalty may be barred.[5] The exist-

---

[2] See *Smith* v. *United States*, 360 U.S. 1, 8-9 (1959).

[3] *COUNT ONE*

"On or about September 2, 1966, CHARLES JACKSON, also known as 'Batman', also known as 'Butch'; GLENN WALTER ALEXANDER DE LA MOTTE; and JOHN ALBERT WALSH, JR. the defendants herein, did knowingly transport in interstate commerce from Milford in the District of Connecticut to Alpine, New Jersey, one John Joseph Grant, III, a person who had theretofore been unlawfully seized, kidnapped, carried away and held by the defendants herein, for ransom and reward and for the purpose of aiding the said defendants to escape arrest, and the said John Joseph Grant, III, was harmed when liberated, in violation of Title 18, United States Code, Section 1201(a)."

[4] The Court need not determine, for purposes of the instant motions, whether defendants effectively may waive jury trial absent consent of the government and approval of the court. Rule 23(a), Fed. R. Crim. P. Cf. *Singer* v. *United States*, 380 U.S. 24, 34-38 (1965).

[5] *Waley* v. *United States*, 233 F.2d 804, 806 (9 Cir. 1956), *cert. denied*, 352 U.S. 896 (1956).

ence of discretionary power in the trial court, on the other hand, to submit the issue of punishment to a jury for its recommendation has been recognized in one Circuit.[6] But even if the trial court has the power to submit the issue of punishment to a jury, that power is discretionary, its exercise uncertain. If defendants waive jury trial or plead guilty, therefore, they may thus gain immunity from capital punishment; if they assert their constitutional right to jury trial, however, the price for assertion of such constitutional right is the risk of death.

[fol. 22] The Supreme Court of the United States recently reversed a state conviction of a capital offense because comment on the failure of the accused to testify had penalized and made costly the assertion of the Fifth Amendment right to silence.[7] Assertion of the equally fundamental right to trial by jury is made no less costly for these defendants by the very terms of the statute which defines the offense with which they are charged.

This Court therefore holds that 18 U.S.C. § 1201(a), to the extent that it impairs defendants' free exercise of their right to trial by jury, violates the Sixth Amendment to the Constitution of the United States and is invalid.

ORDER AND JUDGMENT

The Court having heard argument by counsel for the respective parties on defendants' motions to dismiss the indictment, having received and considered their briefs, the indictment and all other papers on file, and being of the opinion for the reasons set forth above that count one should be dismissed; it is therefore

ORDERED AND ADJUDGED as follows:

(1) Defendants' motions to dismiss count one of the indictment are granted and the said count is dismissed as against each defendant named therein.

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[6] *Seadlund* v. *United States*, 97 F.2d 742, 748 (7 Cir. 1938).

[7] *Griffin* v. *California*, 380 U.S. 609, 614 (1965).

[fol. 23]

(2) Defendants' motions to dismiss count two of the indictment are denied.

(3) The effectiveness of this order and judgment and all other proceedings in this case, including proceedings against defendants under count two, are stayed for a period of thirty (30) days to permit the United States, if it is so advised, to appeal directly to the Supreme Court of the United States from this order and judgment pursuant to 18 U.S.C. § 3731.

(4) Orders of this Court now in effect with respect to bail and custody of defendants shall continue during the period of the stay provided for in paragraph (3) above.

(5) Jurisdiction of this Court is retained to extend, dissolve or modify the stay provided for in paragraph (3) above, subject to any superceding proceedings or orders of the Supreme Court.

Dated at New Haven, Connecticut, this 9th day of January, 1967.

/s/ William H. Timbers
Chief Judge

[fol. 24]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Criminal No. 11,829

[File Endorsement Omitted]

UNITED STATES OF AMERICA

vs.

CHARLES JACKSON, also known as "Batman", also known as "Butch"; GLENN WALTER ALEXANDER DE LA MOTTE; and JOHN ALBERT WALSH, JR.

ORDER AMENDING PARAGRAPH (4) OF THE ORDER AND JUDGMENT OF THE DISTRICT COURT DATED JANUARY 9, 1967—March 22, 1967

The District Court by an Order and Judgment dated January 9, 1967 having granted defendants' motions to dismiss count one of the indictment, having denied defendants' motions to dismiss count two of the indictment, having stayed the effectiveness of said order and judgment for 30 days to permit the government to appeal directly to the Supreme Court, having directed that orders then in effect with respect to bail and custody of defendants should continue during the period of the 30 day stay and having retained jurisdiction to extend, dissolve or modify the stay, subject to any superseding proceedings or orders of the Supreme Court; and

The government on February 6, 1967 having filed a notice of appeal to the Supreme Court pursuant to 18 U.S.C. § 3731 from said Order and Judgment of the District Court; and

Each defendant in the meanwhile having separately moved to reduce bail or otherwise to modify the conditions of release; and

[fol. 25] The District Court having entered separate orders reducing the bail of each defendant and otherwise modifying the conditions of release; it is therefore

ORDERED that, confirming the separate orders heretofore entered reducing bail of each defendant, paragraph (4) of the Order and Judgment of the District Court dated January 9, 1967 be, and the same hereby is, amended with respect to each defendant to provides as follows:

(A) As to defendant Jackson—

(i) under Count 1 of the indictment, said defendant is admitted to bail on his own recognizance pending the prosecution and determination of the government's appeal to the Supreme Court from the said Order and Judgment dated January 9, 1967 (18 U.S.C. § 3731, ¶ 9);

(ii) under count 2 of the indictment, said defendant is admitted to bail upon his execution of an appearance bond in amount of $5,000, without surety, and upon his deposit in the registry of this Court of the sum of $500, such deposit to be returned upon the performance of the conditions of release; said defendant is restricted to the District of Connecticut and the City of New York as a condition of [fol. 26] his release; and said defendant is placed in the custody of Steven B. Duke, Esq., one of his attorneys, as a condition of his release (18 U.S.C. § 3146(a)(1)(2) and (3)).

(B) As to defendant De La Motte—

(i) under Count 1 of the indictment, said defendant is admitted to bail on his own recognizance pending the prosecution and determination of the government's appeal to the Supreme Court from the said Order and Judgment dated January 9, 1967 (18 U.S.C. § 371, ¶ 9);

(ii) said defendant is admitted to bail upon his posting a $5,000 appearance bond, with corporate surety, said bond having been posted January 31, 1967 (18 U.S.C. § 3146(a)(4)).

(C) As to defendant Walsh—

(i) under Count 1 of the indictment, said defendant is admitted to bail on his own recognizance pending the prosecution and determination of the government's appeal to the Supreme Court from the said Order and Judgment dated January 9, 1967 (18 U.S.C. § 3731, ¶ 9);

[fol. 27]

(ii) said defendant is admitted to bail upon his posting a $5,000 appearance bond, with John A. Walsh, Sr. as surety, and upon his deposit in the registry of this Court of the sum of $500, such deposit to be returned upon the performance of the conditions of release, said appearance bond having been posted and said deposit having been made in the registry of this Court on January 26, 1967 (18 U.S.C. § 3146(a)(3)).

and it is further

ORDERED that in all other respects the said Order and Judgment of the District Court dated January 9, 1967 be, and the same hereby is, confirmed; and it is further

ORDERED that the instant order amending paragraph (4) of the Order and Judgment of the District Court dated January 9, 1967 be, and the same hereby is, in all respects subject to any superseding proceedings or orders of the Supreme Court.

Dated at New Haven, Connecticut, this 22nd day of March, 1967.

/s/ William H. Timbers
Chief Judge

[fol. 28]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. 11829

[File Endorsement Omitted]

UNITED STATES OF AMERICA

v.

CHARLES JACKSON, aka "BATMAN", aka "BUTCH"; GLENN WALTER ALEXANDER DE LA MOTTE; and JOHN ALBERT WALSH, JR.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed February 6, 1967

I. Notice is hereby given that the United States appeals to the Supreme Court of the United States from the order of January 9, 1967, dismissing Count 1 of the indictment which charged the defendants Charles Jackson, Glenn Walter Alexander De La Motte and John Albert Walsh, Jr. with violating 18 U.S.C. 1201(a).

This appeal is taken pursuant to 18 U.S.C. 3731.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include therein the following:

1. Transcript of docket entries
2. Indictment
3. Motions to dismiss the indictment
4. Memorandum of Defendant Charles Jackson in support of motion to dismiss indictment
5. Motions for Bills of Particulars
6. Government's Bills of Particulars
7. Memorandum of decision, order and judgment granting defendants' motion to dismiss count one of the indictment (filed January 9, 1967)
8. This notice of appeal

III. The following question is presented by this appeal:

Whether 18 U.S.C. 1201(a), the Federal Kidnapping [fol. 29] Act, is rendered invalid as impairing the constitutional right to trial by jury by providing for punishment by death "if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend."

Dated at Hartford, Connecticut, this 3rd day of February, 1967.

/s/ Jon O. Newman
United States Attorney
District of Connecticut

[Certificate of service omitted in printing]

[fol. 30]

[Clerk's certificate to foregoing transcript omitted in printing]

[fol. 31]

SUPREME COURT OF THE UNITED STATES

No. 1236, October Term, 1966

UNITED STATES, APPELLANT

v.

CHARLES JACKSON, ET AL.

APPEAL from the United States District Court for the District of Connecticut.

ORDER NOTING PROBABLE JURISDICTION—May 29, 1967

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

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No. ——

In the Supreme Court of the United States

OCTOBER TERM, 1966 7

UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES JACKSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

THURGOOD MARSHALL,
Solicitor General,
FRED M. VINSON, Jr.,
Assistant Attorney General,
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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES JACKSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

OPINION BELOW

The order and opinion of the district court dismissing count one of the indictment (Appendix, *infra*, pp. 9–13) is reported at 262 F. Supp. 716.

JURISDICTION

The order of the district court dismissing count one of the indictment on the ground of the unconstitutionality of the statute on which the indictment was founded was entered on January 9, 1967. Notice of appeal to this Court was filed on February 6, 1967. The jurisdiction of this Court to review, on direct appeal, a judgment dismissing an indictment because

257-911—67——1

of the invalidity of the statute on which it is founded is conferred by 18 U.S.C. 3731.

STATUTE INVOLVED

18 U.S.C. 1201(a) provides:

> Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

QUESTION PRESENTED

Whether the federal Kidnaping Act, 18 U.S.C. 1201(a), unconstitutionally impairs the right to trial by jury by providing for the death penalty, in cases where the victim has been harmed, "if the verdict of the jury shall so recommend."

STATEMENT

Count one of a two-count indictment returned in the District of Connecticut charged that appellees, in violation of 18 U.S.C. 1201(a), transported in interstate commerce a named person who had been kidnaped and held for the purpose of aiding the appellees to escape arrest and for ransom, and that the kidnaped person was harmed when liberated.[1] The trial court dis-

[1] Count two of the indictment charged appellees with the interstate transportation of a stolen motor vehicle in violation of 18 U.S.C. 2312. Appellees have not challenged count two.

missed this count of the indictment, holding the Act unconstitutional as impairing the right to trial by jury. The court found that, since the death penalty is mandatory if recommended by a jury and cannot be imposed without such recommendation, trial by jury entails a risk of death which may be avoided or at least substantially reduced by waiving jury trial. The court suggested that even if the trial court has the power to submit the issue of punishment to a jury following a guilty plea or a non-jury trial, that power is discretionary and will not necessarily be invoked. The court concluded that Section 1201(a) makes the assertion of the Sixth Amendment right so costly as to impair its free exercise and that the statute therefore violates the Constitution.

THE QUESTION IS SUBSTANTIAL

1. The decision below strikes down a federal statute enforced over a period of thirty-five years notwithstanding other challenges to its validity. See, *e.g., Robinson* v. *United States,* 324 U.S. 282. The decision, if followed in other districts, would leave the federal government without present means to deal with the interstate aspects of a particularly grave and odious felony as to which Congress long ago determined that State law enforcement efforts require federal supplementation. The significance of Section 1201 for law enforcement was recognized in *Chatwin* v. *United States,* 326 U.S. 455, 462–463, where this Court found that, "armed with this legislative mandate, federal officials have achieved a high and effective control of this type of crime" and have eliminated a crime that "had become an epidemic in the

United States." A decision holding so important a statute to be unconstitutional manifestly presents a serious question.

The implications of the decision below are not limited to the Kidnaping Act. The decision casts doubt upon prosecutions under the bank robbery statute, 18 U.S.C. 2113(e), which contains a similarly worded penalty provision ("punished by death if the verdict of the jury shall so direct"). That provision was enacted in 1934 as part of the same legislative program that added the death penalty provision to the Kidnaping Act (see 78 Cong. Rec. 8775–8776). More recently, Congress has made a jury recommendation a precondition to the death penalty (and to life imprisonment as well) in prosecutions under the Atomic Energy Act for disclosing, receiving or tampering with certain restricted data, 42 U.S.C. 2274–2276 ("but the penalty of death or imprisonment for life may be imposed only upon recommendation of the jury").[2]

2. Certainly in committing the issue of punishment to the jury Congress did not seek or intend to impair the constitutional right to jury trial on the issue of

[2] Compare 18 U.S.C. 1992 which provides that a person convicted of train wrecking resulting in death is subject "to the death penalty or to imprisonment for life, if the jury shall in its discretion so direct, or, in the case of a plea of guilty, if the court in its discretion shall so order." Both 49 U.S.C. 1472(i) (aircraft piracy) and 18 U.S.C. 34 (destruction of aircraft or motor vehicles resulting in death) impose the death penalty if the jury recommends it "or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived trial by jury, if the court in its discretion shall so order."

guilt.[3] Accordingly, any permissible construction of Section 1201 that avoids constitutional infirmity should be preferred. *United States* v. *Harriss,* 347 U.S. 612; *United States* v. *Witkovich,* 353 U.S. 194, 201–202. Assuming, as we do, that a statute may not make an appreciably enhanced hazard of a death sentence the price of asserting a constitutional right, we point out that there are available interpretations of Section 1201 which would equalize that hazard regardless of whether guilt is ascertained by the jury, the court or by guilty plea.

(*a*) Section 1201 may be construed to require the submission of the penalty issue to a jury when guilt and harm to the victim have been established by plea or by trial to the court. The likelihood of a death penalty would then be wholly unaffected by the de-

[3] The legislative history sheds little light on interpretation of this provision. As originally enacted in 1932 (47 Stat. 326), the Kidnaping Act contained no provision for the death penalty. The House Judiciary Committee had reported a bill which authorized a death penalty unless the jury recommended mercy (75 Cong. Rec. 13294), but it was opposed on the ground that it did not accord with traditional federal practice giving the court the power to impose penalities. An amendment was adopted providing for punishment by death or imprisonment in the discretion of the court (75 Cong. Rec. 13288, 12396–13297). There was opposition to the death penalty (75 Cong. Rec. 13284–13286, 13294–13295) and the bill passed by the Senate which had no death penalty was substituted and enacted (75 Cong. Rec. 13303–13304).

In 1934, the death penalty clause was added to the 1932 Act with several other amendments (48 Stat. 781). The House report merely states that its addition "is to permit the jury to designate a death penalty for the kidnaper." H. Rep. No. 1457, 73d Cong., 2d Sess., p. 2. There were no hearings and no debates on this provision. See H. Rep. No. 1595, 73d Cong., 2d Sess.

fendant's election or waiver of jury trial on the issue of guilt. Such a construction seems consistent with the statutory language. Indeed, there is no reason to suppose that Congress intended to make the severity of sentence depend upon the mode of determining guilt.[4]

(*b*) Alternatively, the act may be construed as giving the trial court discretionary power to submit or withhold the penalty issue from a jury, regardless of the procedure by which guilt is determined. Thus the judge would be free to withhold the question of penalty in a case tried to a jury or to submit it to a jury where there has been a guilty plea or a trial to the court. A defendant would then run no greater risk in seeking trial by jury. That Section 1201(a) gives the trial court discretionary power to submit the penalty issue to a jury following a guilty plea has been recognized in at least one circuit. *Seadlund* v. *United States,* 97 F. 2d 742, 748 (C.A. 7). That the trial court has power to withhold the penalty issue when the issue of guilt is submitted to a jury seems implicit in the Second Circuit's recent approval of two-stage trials. *United States* v. *Curry,* 358 F. 2d 904, 913–916.

2. Even on the district court's premises, there is no sound reason to strike down the Kidnaping Act in its entirety. As noted above (p. 5, n. 3, *supra*), the provision authorizing the death penalty was added to

[4] *Waley* v. *United States*, 233 F. 2d 804 (C.A. 9), which was relied on by the court below, holds only that the question of guilt need not be submitted to a jury after a guilty plea has been entered; the appellant there did not suggest and the court did not decide whether the penalty question alone may or must be submitted to a jury after a guilty plea.

the 1932 Act by amendment in 1934. If that added provision is invalid, the rest of the statute is clearly severable. As this Court said in *Champlin Rfg. Co.* v. *Commission,* 286 U.S. 210, 234:

> * * * The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

See also *United States* v. *Harriss,* 347 U.S. 612, 627. Here, there is no possible basis for doubting that Congress resolutely intended to make the interstate transportation of kidnaped persons a federal crime; the infirmity, if any, in the capital penalty clause does not require the total frustration of that purpose. In no event, therefore, should the charge have been dismissed.

CONCLUSION

It is respectfully submitted that probable jurisdiction should be noted.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON,
Assistant Attorney General.

ROBERT S. RIFKIND,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

APRIL 1967.

APPENDIX

United States District Court, District of Connecticut

Criminal No. 11,829

UNITED STATES OF AMERICA

v.

CHARLES JACKSON, ALSO KNOWN AS "BATMAN", ALSO KNOWN AS "BUTCH"; GLENN WALTER ALEXANDER DE LA MOTTE; AND JOHN ALBERT WALSH, JR.

MEMORANDUM OF DECISION, ORDER AND JUDGMENT GRANTING DEFENDANTS' MOTIONS TO DISMISS COUNT ONE OF INDICTMENT

Defendants' motions to dismiss count one of the indictment, pursuant to Rule 12, Fed. R. Crim. P., made before entry of pleas, present what the Court believes to be a substantial question as to whether 18 U.S.C. § 1201(a), a part of the Federal Kidnaping Act, is unconstitutional to the extent that it impairs defendants' free exercise of their Sixth Amendment right to trial by jury.

The Court holds that the section of the statute here applicable to defendants who are about to be put to plea thereunder does violate their Sixth Amendment right. Accordingly, defendants' motions to dismiss count one of the indictment are granted, subject to the stay of proceedings hereinafter provided to permit the United States to appeal directly to the Supreme Court of the United States.

INDICTMENT

The indictment, returned by a grand jury in the District of Connecticut on October 10, 1966, charges each of the three named defendants with two counts. Count one charges that on or about September 2, 1966, defendants transported from Milford, Connecticut, to Alpine, New Jersey, one John Joseph Grant, III, the kidnaped victim, who was harmed when liberated, in violation of 18 U.S.C. § 1201(a). Count two charges that on or about September 2, 1966 defendants transported a stolen motor vehicle from Milford, Connecticut, to New York City, in violation of 18 U.S.C. § 2312.[1]

STATUTE

Count one of the indictment is founded upon 18 U.S.C. § 1201(a), which provides in pertinent part as follows:

> "Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully seized, . . . kidnaped, . . . or carried away and held for ransom or reward or otherwise, . . . *shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend,* or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed." [Emphasis added.]

This statute creates an offense which calls for capital punishment upon recommendation of the jury,

[1] Although counsel for defendants Jackson and Walsh have filed motions "to dismiss the indictment", in neither their motions, briefs nor oral arguments have they challenged count two in any respect. Counsel for defendant De La Motte, although not having filed any motion or brief, at the hearing on the motions by the other defendants, generally adopted the arguments made by counsel for the other defendants.

if proof of harm is introduced at the trial.[2] That the government intends to prove harm in the instant case is clearly indicated by the language of count one,[3] which charges that the kidnaped victim "was harmed when liberated". Imposition of the death penalty turns upon the jury's recommendation. Under the terms of the statute, the death penalty may be imposed *only* if the jury so recommends. On the other hand, a recommendation by the jury makes the death penalty *mandatory*.

If defendants claim their fundamental Sixth Amendment right to trial by jury, therefore, they must risk their lives. That risk is at least substantially reduced if defendants waive their constitutional right to jury trial by claiming trial to the court[4] or by pleading guilty. In the event of a guilty plea, it has been suggested that imposition of the death

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[2] See *Smith* v. *United States*, 360 U.S. 1, 8–9 (1959).

[3] *COUNT ONE:*

"On or about September 2, 1966, CHARLES JACKSON, also known as 'Batman', also known as 'Butch'; GLENN WALTER ALEXANDER DE LA MOTTE; and JOHN ALBERT WALSH, JR., the defendants herein, did knowingly transport in interstate commerce from Milford in the District of Connecticut to Alpine, New Jersey, one John Joseph Grant, III, a person who had theretofore been unlawfully seized, kidnapped, carried away and held by the defendants herein, for ransom and reward and for the purpose of aiding the said defendants to escape arrest, and the said John Joseph Grant, III, was harmed when liberated, in violation of Title 18, United States Code, Section 1201(a)."

[4] The Court need not determine, for purposes of the instant motions, whether defendants effectively may waive jury trial absent consent of the government and approval of the Court. Rule 23(a), Fed. R. Crim. P. Cf. *Singer* v. *United States*, 380 U.S. 24, 34–38 (1965).

penalty may be barred.[5] The existence of discretionary power in the trial court, on the other hand, to submit the issue of punishment to a jury for its recommendation has been recognized in one Circuit.[6] But even if the trial court has the power to submit the issue of punishment to a jury, that power is discretionary, its exercise uncertain. If defendants waive jury trial or plead guilty, therefore, they may thus gain immunity from capital punishment; if they assert their constitutional right to jury trial, however, the *price* for assertion of such constitutional right is the risk of death.

The Supreme Court of the United States recently reversed a state conviction of a capital offense because comment on the failure of the accused to testify had penalized and made costly the assertion of the Fifth Amendment right to silence.[7] Assertion of the equally fundamental right to trial by jury is made no less costly for these defendants by the very terms of the statute which defines the offense with which they are charged.

This Court therefore holds that 18 U.S.C. § 1201(a), to the extent that it impairs defendants' free exercise of their right to trial by jury, violates the Sixth Amendment to the Constitution of the United States and is invalid.

ORDER AND JUDGMENT

The Court having heard argument by counsel for the respective parties on defendants' motions to dismiss the indictment, having received and considered their briefs, the indictment and all other papers on file, and being of the opinion for the reasons set forth

[5] *Waley* v. *United States*, 233 F. 2d 804, 806 (9 Cir. 1956), *cert. denied*, 352 U.S. 896 (1956).

[6] *Seadlund* v. *United States*, 97 F. 2d 742, 748 (7 Cir. 1938).

[7] *Griffin* v. *California*, 380 U.S. 609, 614 (1965).

above that count one should be dismissed; it is therefore

ORDERED AND ADJUDGED as follows:

(1) Defendants' motions to dismiss count one of the indictment are granted and the said count is dismissed as against each defendant named therein.

(2) Defendants' motions to dismiss count two of the indictment are denied.

(3) The effectiveness of this order and judgment and all other proceedings in this case, including proceedings against defendants under count two, are stayed for a period of thirty (30) days to permit the United States, if it is so advised, to appeal directly to the Supreme Court of the United States from this order and judgment pursuant to 18 U.S.C. § 3731.

(4) Orders of this Court now in effect with respect to bail and custody of defendants shall continue during the period of the stay provided for in paragraph (3) above.

(5) Jurisdiction of this Court is retained to extend, dissolve or modify the stay provided for in paragraph (3) above, subject to any superceding proceedings or orders of the Supreme Court.

Dated at New Haven, Connecticut, this 9th day of January, 1967.

WILLIAM H. TIMBERS,
Chief Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1967

SUPREME COURT, U. S.
No. 85

Office-Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES JACKSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES

RALPH S. SPRITZER,
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FRED M. VINSON, JR.,
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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 85

UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES JACKSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion and order of the district court (R. 15-19) are reported at 262 F.Supp. 716.

JURISDICTION

The order of the district court dismissing count one of the indictment on the ground of the unconstitutionality of the statute upon which the indictment was founded was entered on January 9, 1967 (R. 18-19). Notice of appeal to this Court was filed on February 6, 1967, and probable jurisdiction was noted on

May 29, 1967 (387 U.S. 929; R. 25). We invoke the jurisdiction of this Court under 18 U.S.C. 3731.

STATUTE INVOLVED

18 U.S.C. 1201(a) provides:

> Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

QUESTION PRESENTED

Whether the Federal Kidnaping Act, 18 U.S.C. 1201(a), is void under the Sixth Amendment because it provides for the death penalty (in cases where the victim has been killed or otherwise harmed) "if the verdict of the jury shall so recommend."

STATEMENT

Respondents were indicted on October 10, 1966. Count one charged that they had transported in interstate commerce from Milford, Connecticut, to Alpine, New Jersey, in violation of 18 U.S.C. 1201(a), one John Joseph Grant III, an individual whom they had kidnaped to help them escape arrest, and that the

victim was harmed when liberated (R. 1).[1] By bills of particulars, the government specified that the victim had suffered lacerations of the wrist, hands and arms (R. 3; see, also, R. 14).

Respondents Jackson and Walsh filed motions to dismiss the indictment, contending that the Kidnaping Act is void for vagueness because it uses the words "ransom or reward or otherwise" (R. 4-6).[2] In his memorandum in support of his motion, respondent Jackson urged two other grounds for dismissal, one of which was that, because the statute authorizes the death penalty "if the verdict of the jury shall so recommend," he was put "to an unconstitutional choice, rendering it impossible for him to enter a voluntary plea of guilty or to plead not guilty without paying a heavy price" (R. 7-8).[3]

The district court accepted this argument. It interpreted the statute to provide that "the death penalty may be imposed *only* if the jury so recommends" but that "a recommendation by the jury makes the death penalty *mandatory*" (R. 17; emphasis the

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[1] A second count charged the transportation in interstate commerce of a stolen motor vehicle, in violation of 18 U.S.C. 2312. It is still outstanding.

[2] Respondent De La Motte did not file a written motion to dismiss, but at the hearing on his co-defendants' motions generally adopted their arguments (R. 16).

[3] His other ground was that the statutory authorization of capital punishment, in light of the conduct for which that penalty can be assessed, permits punishment so grossly disproportionate to the gravity of the offense as to constitute "cruel and unusual punishment" in violation of the Eighth Amendment (R. 8-10).

court's). While remarking *Seadlund* v. *United States*, 97 F. 2d 742, 748 (C.A. 7)—which holds that a trial court has authority, after accepting a guilty plea, to submit the question of punishment to a jury—the court nevertheless stated that such authority "is discretionary, its exercise uncertain" (R. 18); that "the price for assertion" of the right to trial by jury is, therefore, "the risk of death" (R. 18); and that this risk "is at least substantially reduced" if the defendant pleads guilty or waives jury trial (R. 17). Invoking this Court's decision in *Griffin* v. *California*, 380 U.S. 609, 614, for the proposition that a statute or procedure cannot stand which makes "costly" the assertion of a constitutional right, it concluded that the Kidnaping Act "impairs defendants' free exercise of their right to trial by jury" and thus "violates the Sixth Amendment to the Constitution of the United States and is invalid" (R. 18).

ARGUMENT

Introduction and Summary

The district court held in this case that the Kidnaping Act is void under the Sixth Amendment because it provides for capital punishment "if the verdict of the jury shall so recommend"—thus discouraging defendants, in the court's view, from asserting their constitutional right to trial by jury. This novel ruling (which would invalidate a number of other criminal laws)[4] rests, in our view, upon unsound rea-

[4] Similar provisions are contained in 18 U.S.C. 2113(e) (bank robbery); 42 U.S.C. 2272, 2274-2276 (atomic espion-

soning. Government may not penalize a criminal defendant for asserting his constitutional rights—as by making his refusal to take the stand in his defense a matter of comment by the judge or the prosecutor. *Griffin* v. *California*, 380 U.S. 609. But it does not follow, as the court below implied, that all procedures for mitigating the severity of criminal punishment are invalid because they may occasionally provide some inducement to a defendant to forego a procedural right.

At all events, in the view we take of this case, this Court need not decide that broad question. We think the court below erred in its conclusion that a kidnaping defendant who elects a jury trial thereby materially increases the likelihood that capital punishment will be imposed. Even if he waived trial by jury or pleaded guilty, it would not follow that he would escape that penalty. The trial court could—and, in an appropriate case, experience shows, would—empanel a jury to determine punishment, regardless of the defendant's decision to concede his guilt or have it determined by the court. In addition, we read the statute as authorizing the court to decline the jury's recommendation of capital punishment and impose a lesser penalty. As we explain, the short of the matter is that the provision requiring the jury to

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age); D.C. Code, § 22-2801 (rape); and in a number of State criminal statutes. Nev. Rev. Stat., § 200. 360; N.H. Rev. Stat. § 585:4; Wyo. Stat., § 6-59. Cf. N.J. Stat., §§ 2A:113-3, 2A:113-4; *Bullock* v. *Harpole*, 233 Miss. 486, 494, 102 So. 2d 687, 690.

authorize the death penalty is designed to minimize, not to increase, the occasions of its imposition.

If we are wrong, and this provision of the Kidnaping Act is unconstitutional, it by no means follows, as the court below thought, that the statute is void and no punishment can be imposed upon a convicted kidnaper. Clearly, the provision for capital punishment should be viewed as severable from the remaining provisions of the statute, Congress' paramount purpose in enacting the statute having been, not the imposition of the death penalty, but the punishment of kidnaping as a federal crime.

I. The Provision of the Kidnaping Act Imposing Capital Punishment If the Jury so Recommends Does Not Burden the Assertion of the Right to Trial by Jury in Violation of the Sixth Amendment

In holding the Kidnaping Act unconstitutional because it requires a jury recommendation as the prerequisite for imposition of the death penalty, the district court announced a principle having far-reaching and disquieting implications. The principle is that any procedure for mitigating the severity of criminal punishment is invalid if, to invoke the procedure, the defendant might be induced to forego a constitutional right. Were this proposition sound, a judge would be precluded from ever entertaining a guilty plea to a lesser offense than that charged, lest the defendant argue that he was induced to forego his right to trial by jury by fear of incurring a heavier punishment. Such a result would be unfortunate. It would rob the criminal process of much of its flexibility, and

would almost certainly lead to generally heavier penalties. We cannot agree that it is compelled by *Griffin* v. *California*, 380 U.S. 609—the only authority relied on by the district court for its proposition.

The question in that case was whether a judge's or prosecutor's comment to the jury that the refusal of the accused to take the stand and testify in his defense evidenced his guilt improperly curtailed the exercise of his Fifth Amendment right to remain silent. This Court held that it did. The only purpose of commenting on the accused's silence was to turn the assertion of his constitutional right to the advantage of the prosecution. No one suggests that the practice of permitting criminal defendants to plead guilty to lesser offenses, or of requiring the jury's authorization before the death penalty may be imposed, were devised to enable the prosecution to thwart the assertion of constitutional rights. Both practices, rather, operate to mitigate the severity of punishment.

The requirement that imposition of capital punishment be authorized by a jury "reflects the movement * * * against the death sentence"; it "seeks to retain capital punishment as a policy but does not make its imposition after a finding of guilty imperative." *Andres* v. *United States*, 333 U.S. 740, 753-754 (Frankfurter, J., concurring.) Thus, it has been said with respect to the jury-authorization requirement—similar to that at bar—of the Atomic Energy Act that its purpose "was to ameliorate the penalties imposed for disclosing atomic secrets" (*Rosenberg* v. *United States*, 346 U.S. 273, 317 (Appendix to Opinion of

Douglas, J., dissenting)). Such legislation, "which deprives the District Court of unconditional power to impose the death sentence," is "the less harsh statute" than "one which grants such unconditional power." *Id.* at 299 (Black, J., dissenting).[5]

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[5] The sentencing procedure of the Atomic Energy Act was clearly adopted as a compromise between those who favored capital punishment and those who opposed it. The original bill (S. 1717), as it passed the Senate and was introduced to the House by the Committee on Military Affairs, provided a maximum penalty for atomic espionage of twenty years' imprisonment and a $20,000 fine. S. Rep. No. 1211, 79th Cong., 2d Sess., pp. 23, 30; H. Rep. No. 2478, 79th Cong., 2d Sess., p. 12. The bill was amended on the House floor to increase the maximum penalty to death. 92 Cong. Rec. 9482. The Senate and House conferees agreed that "the penalty of death or imprisonment for life may be imposed, but only upon the recommendation of the jury * * *" (H. Conf. Rep. No. 2670, 79th Cong., 2d Sess., p. 9); Representative Thomason, the House manager of the bill, explained that "the committee thought just as a matter of justice and also in trying to be practical * * * that the death penalty should only be imposed by a jury" (92 Cong. Rec. 10194).

The sentencing procedures of the Kidnaping Act and of subsection (e) of the bank robbery statute appear to reflect a similar compromise. When first enacted in 1932 the Kidnaping Act contained no capital penalty. 47 Stat. 326. A provision empowering the court to impose the death penalty had been contained in the original Senate bill (S. 1525), but had been struck in committee. S. Rep. No. 765, 72d Cong., 1st Sess. A similar provision had been contained in the original House bill (H.R. 5657) (see Kidnaping: Hearing Before the House Committee on the Judiciary, 72d Cong., 1st Sess., on H.R. 5657, p. 1), but had been amended in committee to authorize the jury to recommend mercy (H. Rep. No. 1493, 72d Cong., 1st Sess.). Debate produced a three-way division. Some members, for a variety of reasons, opposed capital punishment (75 Cong. Rec. 13284-13285, 13289-13290, 13294, 13297, 13304); others favored it (*id.*, 13283, 13284, 13286-13295); and some preferred the traditional practice of leaving sen-

It is arguable, to be sure, that in some instances ameliorative provisions may have the incidental effect of inducing defendants not to contest in full measure. The answer, we submit, is that the trial judge must be alert to the possible danger; he must refuse to accept a plea or waiver that is not the product of unfettered choice. Adequate safeguards thus exist; it is not, in our view, necessary to adopt an absolute prohibition of all procedures that may contain some potential of inducement to forego a constitutional right—a Procrustean result that would most often work to the harm of the accused. Certainly, the

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tencing discretion to the court (*id.*, 13288, 13296). Those who expressed support for the committee amendment interpreted it as authorizing imposition of the death penalty only if the jury so determined (*id.*, 13294-13295), and they favored that procedure because it took the onus of inflicting death from the judge in cases "of such atrocity, or such heinousness" that capital punishment was warranted (*id.*, 13297).

In the face of the Senate's adamant opposition to the death penalty (*id.*, 13299, 13303, 13304), the House accepted the Senate bill without capital punishment. But then in 1934 the Senate passed a bank robbery bill (S. 2841) which authorized the death penalty, at the discretion of the court, for killing or kidnaping in connection with such robberies (78 Cong. Rec. 5738). The House amended the provision to its present form (H. Rep. No. 1461, 73d Cong., 2d Sess.), and added a similar provision as an amendment to a Senate bill (S. 2252) making other changes in the Kidnaping Act (H. Rep. No. 1457, 73d Cong., 2d Sess.; 78 Cong. Rec. 8127-8128).

From this history, it would appear that the capital provisions of both Acts (like the similar provision of the Atomic Energy Act) were enacted in the form they were as a compromise designed to limit the death sentence to egregious cases "of such atrocity, or such heinousness" that a jury would authorize its imposition.

Griffin decision compels no such conclusion. The lower courts have uniformly rejected the extreme view adopted by the district court in this case.[6]

We pretermit further discussion of this broad question to observe that the element of inducement in the present context is, in any event, far too attenuated to constitute a significant burden upon assertion of the right to a jury trial. The defendant in a kidnaping case does not, by attempting to plead guilty or waive trial by jury, avert the possibility of capital punishment; and, conversely, by electing trial by jury, he does not materially enhance the risk that he

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[6] *Martin* v. *United States*, 256 F. 2d 345, 347-349 (C.A. 5), certiorari denied, 358 U.S. 921; *Laboy* v. *New Jersey*, 266 F. Supp. 581 (D. N.J.); *United States* v. *Willis*, 75 F. Supp. 628 (D. D.C.). Compare the cases holding that a plea of guilty is not coerced merely because it is induced by an agreement to limit punishment by dismissing counts, not bringing charges, or making recommendations to the court. *Cortez* v. *United States*, 337 F. 2d 699 (C.A. 9), certiorari denied, 381 U.S. 953; *Kent* v. *United States*, 272 F. 2d 795 (C.A. 1); *Harrell* v. *United States*, 371 F. 2d 160, 162 (C.A. 7), certiorari denied, 387 U.S. 923; *Martin* v. *United States*, *supra*, 256 F. 2d at 348-349; *Booth* v. *United States*, 251 F. 2d 296, 297 (C.A. 9); *Brown* v. *United States*, 204 F. 2d 298, 300-301 (C.A. 5), certiorari denied, 346 U.S. 925; *Tabor* v. *United States*, 203 F. 2d 948 (C.A. 4), certiorari denied, 345 U.S. 1001. Compare, also, the general principle that a defendant who establishes prejudicial publicity warranting a change of venue cannot escape prosecution by complaining that to assert his right to an impartial jury he was forced to waive another Sixth Amendment right: that to a speedy trial, or to trial in the vicinage. See *United States* v. *Dennis*, 183 F. 2d 201, 226 (C.A. 2), affirmed, 341 U.S. 494; *Delaney* v. *United States*, 199 F. 2d 107, 112 (C.A. 1); *Harney* v. *United States*, 306 F. 2d 523, 532, n. 4 (C.A. 1), certiorari denied *sub nom.* *O'Connell* v. *United States*, 371 U.S. 911.

will be so punished. The trial judge is not required to approve a waiver of jury trial or accept a plea of guilty.[7] And even if he does approve waiver of jury trial with respect to the issue of guilt or innocence, or accepts a plea of guilty, he remains free to convene a jury for purposes of recommending appropriate punishment.[8]

The district court did not dispute the existence of the power, but disparaged it as discretionary and uncertain. We point out, however, that in the majority of the cases under the Kidnaping and Bank Robbery Acts in which capital punishment has been imposed, the trial judge refused to permit the defendant to avoid a jury recommendation on punishment by pleading guilty or waiving trial by jury.[9] Perhaps, a jury

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[7] *Singer* v. *United States*, 380 U.S. 24; *Gooch* v. *United States*, 82 F. 2d 534, 535 (C.A. 10), certiorari denied, 298 U.S. 658; *Green* v. *United States*, 40 App. D.C. 426 (C.A. D.C.); *United States* v. *Willis*, 75 F. Supp. 628 (D.D.C.); Rule 23(a), Federal Rules of Criminal Procedure.

[8] *Seadlund* v. *United States*, 97 F. 2d 742, 748 (C.A. 7). See, also, *United States* v. *Dalhover*, 96 F. 2d 355 (C.A. 7), certiorari denied, 305 U.S. 632. The practice in States having similar provisions (n. 4, *supra*, pp. 4-5) is generally the same. *E.g.*, *State* v. *Best*, 44 Wyo. 383, 389-390, 12 P. 2d 1110, 1111; *State* v. *Belton*, 48 N.J. 432, 439, 226 A. 2d 425, 429; N.H. Rev. Stat., § 585:5.

[9] According to the records of the Federal Bureau of Prisons, ten defendants have been (or are awaiting) execution under these provisions. Case reports and Department of Justice records disclose that five pleaded guilty; yet, the question of their punishment was still submitted to the jury. In two other cases, moreover, the plea was refused by the court, either directly or in effect.

To place the issue of this case in perspective, we further

might recommend capital punishment in a case where the judge would have accepted a guilty plea—but the jury's determination is not, in our view, binding on the court. It has been held that the concurrence of the trial judge in the jury's recommendation is required,[10] and this reading conforms to the long tradition that makes the trial judge in the federal courts the arbiter of the sentence; to the mitigative purpose of the provision requiring jury authorization of the death penalty; and to the decisional trend which has sought—at times in the face of statutory language apparently to the contrary—to place the most humane construction on capital legislation.[11]

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note that, according to the Administrative Office of the United States Courts, 563 individuals were convicted under the Kidnaping Act between 1951 and 1966. Of these, 389 pleaded guilty or no contest, 28 were convicted in a trial to the court, and 146 by juries. Four were sentenced to death—three after pleading guilty. Under the Bank Robbery Act, 4482 were convicted in this period, 3690 after pleading guilty or no contest, 86 after trial to the court, 706 after trial by jury. Two were sentenced to death, both after pleading not guilty. (Administrative Office statistics do not, however, differentiate between those who were convicted under the capital and under the non-capital provisions of the statute.) Between 1952 and 1966, according to these same sources, 144 individuals were convicted of rape in the District of Columbia. None was executed. Fifty-four pleaded guilty or no contest, 5 were convicted by the court and 85 by juries.

[10] *Robinson* v. *United States*, 264 F. Supp. 146, 151-153 (W.D. Ky.); cf. *People of Virgin Islands* v. *Price*, 181 F. 2d 394, 396 (C.A. 3).

[11] See, *e.g.*, *Winston* v. *United States*, 172 U.S. 303; *Andres* v. *United States*, 333 U.S. 740; *Donnelly* v. *United States*, 185 F.2d 559 (C.A. 10), certiorari denied, 340 U.S. 949; cf. *United States* v. *Donovan*, 242 F.2d 61, 64 (C.A. 2).

In sum, whether a defendant in a kidnaping case demands a trial by jury, on the one hand, or decides to waive trial by jury or plead guilty, on the other, there is a similar risk of capital punishment. Either way, the concurrence of both court and jury is necessary for its imposition. If the defendant elects to be tried by a jury, the death penalty will be imposed only if the jury so recommends and the judge agrees. If the defendant chooses not to have a jury trial, the judge must first determine whether he would concur in a jury recommendation of capital punishment; if he decides he would, he will convene a jury for punishment and if the jury recommends capital punishment will presumably concur. We see no essential difference in these procedures.

II. If, Contrary to Our Argument, the Provision of the Kidnaping Act Relating to Capital Punishment Is Void, the Proper Remedy Is Invalidation of That Provision, Not of the Entire Act

All circumstances considered, we urge rejection of the view that the provision in suit so deters exercise of the right to jury trial that it must be struck down, despite its humane and alleviative purpose. But, if we are wrong in our submission, we urge the Court to save the Act as a whole, invalidating only the offensive provision. The provision authorizing the death penalty was not part of the original Act, but was added several years later by amendment (n. 5, *supra*, pp. 8-9). If it is invalid, that should not taint the remaining provisions. As this Court said

in *Champlin Rfg. Co.* v. *Commission*, 286 U.S. 210, 234:

> * * * The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

See, also, *United States* v. *Harriss*, 347 U.S. 612, 627. There is no basis for doubting that Congress resolutely intended to make the interstate transportation of kidnaped persons a federal crime; the infirmity, if any, in the capital penalty clause does not require the total frustration of that purpose. In no event, therefore, should the charge have been dismissed.

CONCLUSION

The judgment of the district court should be reversed, and the case remanded with directions to reinstate count one of the indictment.

Respectfully submitted.

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No. 85

In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN A. WALSH, JR. ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE, JOHN A. WALSH, JR.

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OPINION BELOW

The opinion and order of the district court (R. 15-19) are reported at 262 F.Supp. 716.

JURISDICTION

The order of the district court dismissing count one of the indictment on the ground of the unconstitutionality of the statute upon which the indictment was founded was entered on January 9, 1967 (R. 18-19). Notice of appeal to this Court was filed on February 6, 1967, and probable jurisdiction was noted on May 29, 1967 (387 U.S. 929; R. 25). The government invokes the jurisdiction of this Court under 18 U.S.C. 3731.

STATUTE INVOLVED

18 U.S.C. 1201(a) provides:

> Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, *shall be punished* (1) *by death* if the kidnaped person has not been liberated unharmed, and *if the verdict of the jury shall so recommend, or* (2) *by imprisonment for any term of years or for life, if the death penalty is not imposed.* (Emphasis added)

QUESTION PRESENTED

Whether the Federal Kidnaping Act, 18 U.S.C. 1201(a), is void under the Sixth Amendment because it provides for the death penalty (in cases where the victim has been harmed) "if the verdict of the jury shall so recommend," but does not allow the death penalty otherwise.

STATEMENT

Respondents were indicted on October 10, 1966. Count one charged that they had transported in interstate commerce from Milford, Connecicut, to Alpine, New Jersey, in violation of 18 U.S.C. 1201(a), one John Joseph Grant III, an individual whom they had kidnaped to help them escape arrest, and that the victim was harmed when liberated. (R. 1)

Appellee Walsh moved to dismiss the indictment on the grounds that Sec. 1201 put the defendant to an unconstitutional choice in that it immunizes those who plead guilty against a death penalty and requires those defendants who

demand a trial to choose a jury trial at the risk of their lives. The district court (Judge Timbers, Connecticut District) ordered count one of the indictment dismissed on the ground that the statute, in permitting the death penalty only upon recommendation of jury and making such a recommendation mandatory, tended to deprive defendants of their "fundamental Sixth Amendment right to trial by jury" (R. 17). The court reasoned that if defendants claim trial by jury "they must risk their lives," whereas if they waive a jury or plead guilty, that "risk is at least substantially reduced" because the judge in the latter case has discretion not to convene a jury and thus to eliminate the risk of a death penalty. Even if a court after accepting a guilty plea has authority to convene a jury to determine punishment, the court held "that power is discretionary, its exercise uncertain" (R. 18). The court, however, found it unnecessary to decide whether a judge who accepts a guilty plea has any authority to convene a jury to impose the death sentence, an issue upon which, the court noted, the circuit courts are divided.

The court found that one who waives a jury trial or pleads guilty substantially reduces, if he does not avoid entirely, the risk of a death sentence. The court concluded that the exercise of one's Sixth Amendment rights were made "no less costly" by Sec. 1201 than the assertion of one's Fifth Amendment right not to testify was made costly by comment in *Griffin v. California*, 380 U.S. 609, 614. It therefore held that Sec. 1201(a) is invalid "to the extent that it impairs defendants' free exercise of their right to trial by jury" (R. 18).

ARGUMENT

INTRODUCTION AND SUMMARY

To a defendant accused of a capital crime, any factor which affects the risk of capital punishment is material. Any variation in the degree of that risk is significant. If the assertion of a constitutional right is made a factor tending to increase the risk of death, the exercise of that right is inevitably discouraged. The government's brief does not seriously contend that the statute, as it was read by the court below, does not significantly burden the assertion of one's right to trial by jury. The appellant's real argument is that the court below and the appellees here have misread the Kidnapping Act. In fact, says the appellant, under the provisions governing the imposition of capital punishment, a defendant's exercise of his right to be tried, and/or to be tried by a jury does not "materially" increase the likelihood of capital punishment. Therefore the exercise of those rights is not significantly burdened. An argument hedged with words like "materially" is suspect in any context. In the present context it signals the need for careful scrutiny before the government's bland assurances are accepted. In fact, when the various hypothetical situations which might arise are examined, the very real and chilling impact of this law upon the exercise of the right in question becomes clear.

As we read 1201(a) it provides a mandatory death sentence if the jury which passes on the issue of guilt so recommends, but under no other circumstances. In that situation the accused stands forewarned that assertion of his right to a jury trial may cost him his life. Not even the district judge could relieve that sentence without throwing out the entire conviction and ordering a new trial. But if the accused will waive his right to a jury he is saved — at least he avoids the death penalty. It can hardly be doubted that

in this situation there exists a burden on the assertion of a constitutional right falling within the prohibition of *Griffin v. California*, 380 U.S. 609 (1965).

The appellant argues, however, that the jury's recommendation is not mandatory. In order for the appellant to be correct the clear language of the statute and the thrust of its subsequent amendments must be disregarded. Furthermore, the purpose which the appellant claims for the jury's role under 1201(a) — to relieve the court of the onus attached to the imposition of capital punishment — would be thwarted. Yet even if the appellant's view were sustained, the effect on a defendant's free choice is little changed. He is still induced to avoid the risk, though that risk may be somewhat reduced. If he guesses wrong the price remains high.

The appellant goes still further however, and, having argued that the most humane construction should be given to the statute, reverses field to argue that a statute permitting the death penalty only "if the verdict of the jury shall so recommend" authorizes the court to convene a special jury solely for the purpose of hanging the defendant. The jury thus humanely recommended by the appellant is one whose members, if they are at all alert, will realize that in all probability the judge would not have convened them unless he was of the opinion that the defendant should suffer capital punishment. Furthermore, to assist the defendant in presenting his mercy plea before this impartial and independent jury, many of his procedural and substantive rights are thrown into doubt. All this, the government claims, is authorized by a statute whose capital provisions are supposedly designed to mitigate the risk of death. The only words to be found in 1201(a) which might arguably be thought broad enough to encompass such a procedure are "the jury." But to give those two words such an expansive

meaning in the present context would be to stretch them much too far. The word "jury" brings to the mind of any legislator or layman, and to most lawyers and judges, the image of a fact-finding body charged with the determination of guilt, before which the accused stands possessed of his rights, and before which is presented only that evidence which judicial experience has shown to be reliable, fair and probative. In the absence of evidence that anything more was meant, the term should be confined to its more customary usage.

Should such a sentencing jury nevertheless be thought permissible, the defendant's dilemma remains totally unresolved if the jury's recommendation is mandatory. The defendant must seek the opportunity for the exercise of the court's discretion not to convene the jury. This can be done only by waiving the right to a jury trial.

Even if all the appellant's assumptions were conceded, a significant increase in the risk of death would attend the exercise of the defendant's rights. If a jury trial is elected, the defendant can seek mercy first from the jury and, failing there, from the court. But if he waives the jury or pleads guilty he secures a third chance for mercy — once when the court decides whether to convene a jury, again when the jury deliberates, and a third time when the court decides whether to accept the jury's recommendation. Furthermore, if he desires a jury, the defendant must run the risk that the protections of even the two-step process will be lost as a result of the court's deference to the jury's sovereignty. Finally, the accused may waive his rights in the hope, not that he will be shown special clemency, but that the complexity of the procedure whereby death might be decreed will spell the difference in the court's decision not to commence a new trial for that purpose.

The enumerated penalties which attach to the assertion of one's right to trial and to be tried by a jury are the issues at stake. The issue is not the future of plea bargaining nor the flexibility of the federal system of criminal justice. The unconstitutional burdens complained of are relevant to the plea bargain insofar as they constitute improper and abusive weapons in the prosecutor's hands. For the most part these pressures exist even where the state makes no attempt to strike a bargain. They are inherent in the law as it stands. The death penalty, rather than serving as a punishment for proven crimes, becomes an automatic weapon for securing convictions.

If we are correct as to the effect of this statute, then, under the past decisions of this and other courts in analogous situations, the dilemma confronting a defendant under the Kidnapping Act constitutes an unconstitutional burden on the free exercise of his fundamental rights.

The appellant contends that, even if the offending section is unconstitutional as it stands, this Court can remedy that infirmity by selectively striking from the statute any reference to capital punishment. Appellees might agree that this is one alternative which the body charged with making such decisions would consider. But it is not the only alternative, nor necessarily the best one. Perhaps the better course is to call special sentencing juries in all cases, regardless of the plea. Or the court might be empowered to act alone in imposing capital punishment. Or a trial by jury could be required in all capital cases arising under this section. The choice belongs to the legislature. Congress wrote this law, a law which has now proven to be unconstitutional. Congress should re-enact the statute in a new form if that is desired. This Court is not required to weave through the subsections and sub-subsections of the offending statute in order to rewrite it in acceptable form.

I. *THE PROVISIONS OF THE KIDNAPPING ACT GOVERNING THE IMPOSITION OF CAPITAL PUNISHMENT, HOWEVER CONSTRUED, BURDEN AND PENALIZE THE ASSERTION OF A DEFENDANT'S FIFTH AND SIXTH AMENDMENT RIGHTS, EXPOSING HIM TO THE RISK OF A GREATER PENALTY OR AT LEAST TO A GREATER RISK OF A HARSHER PENALTY IF HE EXERCISES THEM.*

18 U.S.C. 1201(a), if its language is to be given the construction of ordinary usage, causes the death sentence to be mandatory where a jury's verdict so recommends. Conversely, as all parties to this appeal agree, a death sentence cannot be imposed at all absent a jury's recommendation.

The necessary effect of this provision on a defendant charged under its terms is obvious. If he enters a plea of not guilty and claims his right to a jury trial he faces the risk of a jury's mandatory recommendation of capital punishment. By choosing a trial to the court or entering a plea of guilty, however, he can completely eliminate that risk, as the court has no authority to impose a capital sentence. Thus a great disadvantage is attached to the assertion of his right to a trial by a jury.

In its brief, the United States argues several points which, it is claimed, permit the Court to avoid the issue of whether the dilemma posed to defendants, as set forth above, violates the Constitution. These points, says the government, reveal that a defendant charged under the Kidnapping Act who elects a jury trial does not thereby "materially" increase the likelihood that capital punishment will be imposed.

The general position of the government is that, even if a defendant waived his jury trial or pleaded guilty, he would

not necessarily escape the death penalty. Therefore the procedure governing the imposition of capital punishment provides no particular inducement to waive the right to a jury trial. We contend, quite to the contrary, that even if it is assumed that the defendant does not have it within his power absolutely to prevent the imposition of the death penalty, nevertheless it is possible for him to reduce the risk of its imposition by waiving his constitutonal rights. The appellant, nevertheless, contends that the degree to which the accused can mitigate that risk is so slight that it does not result in a "material" burden on the exercise of his rights. That the appellant is incorrect can be demonstrated only by a closer examination of its argument.

The appellant's contention that no material burden is imposed on a defendant's freedom to choose a trial by jury is entirely dependent upon the establishment of two subsidiary points. First, the government argues that the jury's recommendation in favor of the death penalty is not binding on the court. The district judge, it is said, retains the discretion to disregard the jury's decision. Second, the appellant believes that, even when no jury sits on the issue of guilt because it has been waived by the defendant, the court may in its discretion convene a special jury for the sole purpose of deciding whether capital punishment should be imposed. We have pointed out below why the appellant is incorrect on both points. For the present, however, our purpose is to assess the extent to which the burdens apparently imposed by this statute on the free exercise of a defendant's rights are relieved in the event that the appellant is correct about either or both of these subsidiary issues. In our view, the defendant's dilemma survives even if both points were conceded.

First, assume that the appellant is correct on both issues — the jury's recommendation is not mandatory, and the

court is empowered to convene a special jury to authorize the death penalty. Even under these assumptions at least three powerful inducements for the defendant to waive his jury trial remain:

(1) The well known proclivity of many judges to accept a jury's judgment even where it differs from the court's own view raises before a defendant the spectre of a death sentence being imposed upon a jury recommendation which the court itself would not have imposed, and would therefore not have convened a jury to impose, had jury trial been waived. Thus, while it may appear to the government that, in theory, the defendant will receive the benefit of a two stage process in the imposition of sentence whether or not a jury passes on guilt, in actual practice the full benefit of a two-fold screening process may be available, or seem to a defendant to be available, only if a jury trial is waived or a guilty plea is entered.

(2) A second inducement to waive jury trial stems from the complexity of the procedure whereby a court may secure authority to impose the death penalty when a jury trial is waived. At least where the defendant chooses trial to the court, the fact that two trials are necessary to impose the maximum penalty reduces the likelihood that the court will force the defendant to face that risk. If, however, the accused asserts his right to a jury's judgment he is immediately subjected to having the issue of sentence passed upon. The appellant might respond to this point by arguing that since the government can insist upon a jury trial, the choice is not left to the defendant. Therefore, there is no reason to be concerned with inducement to waive a jury trial. If the prosecution seeks the death penalty, it can insist upon a jury trial. If it does not seek that penalty the defendant runs no increased risk. A closer examination, however, reveals that the defendant's dilemma remains a difficult one.

Under the assumptions of the government's argument, it is precisely in the situation wherein the government wishes to induce the defendant to waive a jury on the issue of guilt without giving up hope of securing capital punishment that this statute becomes coercive. Hoping that the court will be deterred from convening a second trial for sentencing because of the length and complexity of that procedure, the defendant is induced to succumb to the prosecutor's will without gaining the assurance that he is to be spared. He is induced not by the hope of leniency, but by the threat of a greater risk of a greater penalty resulting from the assertion of his constitutional right. Guilty or not, he must incur a greater risk of death to reach a jury.

(3) Third, the defendant, by waiving a jury or pleading guilty, can perhaps secure three opportunities to avoid imposition of a capital penalty — first when the court decides whether to convene a special jury, again when the jury considers its decision, and finally, after the jury has decided in favor of capital punishment. If he chooses a jury trial, however, the issue will be submitted to a jury as a matter of course, the court being called upon to exercise its discretion only once.

Thus even under the assumptions of the appellant's strongest argument, 18 U.S.C. 1201(a) significantly burdens the assertion of a defendant's constitutional right. If either of those assumptions is removed the grisly dilemma becomes still more clear cut.

Consider the burdens which arise if the appellant is correct in contending that the jury's recommendation is not mandatory, but is incorrect in thinking that the statute authorizes convening a sentencing jury. The defendant's dilemma in that situation is obvious. He is subjected to an extremely strong inducement to avoid a jury at all costs for, by so doing, he can absolutely avoid the imposition of the

death penalty. At the very least he will have to seek a court trial. But if the government refuses to concur, he will be forced to plead guilty to avoid the risk of the death penalty. Only if this plea is rejected will he face capital punishment. If it has been the prosecutor's wish to secure a guilty plea, however, there will be no one to argue against its acceptance. The notion that the trial court entirely on its own initiative will so supervise the entry of such pleas that none will enter by reason of this coercive arrangement is too far fetched and patently unreliable to warrant much debate. The only factor which at all mitigates the severity of a defendant's problems is the discretion left in the hands of the trial court to decline a jury's recommendation. That this discretion, if it exists, does little to ease the situation has been pointed out above. In fact, it provides a further inducement to waive one's rights in order to secure a three-fold review of the death penalty. It is to be hoped that not all courts will so firmly favor the defendant's death that nothing could be produced in proceedings before the special jury which could convince the court to reject the jury's recommendation.

Now consider the defendant's options if we assume the jury's recommendation to be binding on the court, contrary to the appellant's argument, but concede the court's power to convene a jury to pass sentence. The defendant's tactical dilemma militates still more strongly against the exercise of his right to a jury trial. In this situation, the accused is subjected to a risk which is unmitigated by the hope of leniency at the hands of the court unless a jury is waived or a guilty plea entered. Only by making such concessions can the defendant secure even the limited benefit of the two-tier process wherein both court and jury must concur in the penalty. The risk of death is not eliminated by either option available to the accused, but it is markedly reduced by waiving the right to a jury or to any trial at all.

If neither of the appellant's contentions is approved the statute operates at its coercive worst as we have argued at the beginning of this section. Not only do the comparative risks facing the accused become more disparate, but the surest means of minimizing the risk can be secured only by a drastic decision. The defendant must waive his right to be tried at all. If a jury trial is chosen the risk of a mandatory death sentence is incurred. Yet if the jury can be avoided, the issue is foreclosed and the risk eliminated. If trial to the court is chosen, the government's concurrence is necessary. Of course, if it has been the prosecutor's wish to secure a waiver by relying on the statute's implicit threat of death, the waiver will not be thwarted — whatever comfort that fact may be. But if the government's consent cannot be secured, the most likely way to preclude the death penalty would be to plead guilty. Only the court's discretionary power to reject the plea then stands in the way. Even where the government opposes the plea, the chances of avoiding the death penalty are improved.

A. *Under the Terms of the Statute, the Death Penalty is Mandatory When Recommended by the Jury.*

While it is certainly the wish of no defendant to face the risk of a mandatory recommendation of capital punishment, no reasonable reading of the language of 18 U.S.C. 1201(a) can avoid the conclusion that the section so provides.[1] The

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1 See *United States v. Curry*, 358 F.2d 904, 913-16 (2d Cir. 1965), wherein it is said that in statutes such as 18 U.S.C. 1201 Congress "has ameliorated the harshness of a mandatory death penalty by giving the jury discretion with respect to whether the death sentence shall be imposed." The *Curry* court seems to say that the penalty is ameliorated in that it becomes mandatory only if the jury so recommends, as compared to being mandatory automatically upon conviction. See also *Waley v. U. S.*, 233 F.2d 804, 806 (9th Cir. 1956), wherein it is said that the death penalty may be mandatory when recommended by the jury pursuant to this section.

crucial phrase reads, "shall be punished . . . by death . . . if the verdict of the jury shall so recommend."

The word "shall" is an imperative. It does not mean "may." But even if "shall" is thought to refer to alternative punishments, "by death . . . or by any term of years," the impression that judicial discretion is thereby authorized is quickly dispelled by the qualification attached to the latter alternative — "if the death penalty is not imposed." This final phrase is a pointless truism unless it refers to the outcome of the jury's recommendation. The court may impose a prison sentence unless the jury recommends death. That the language should not be thought mere surplusage is revealed by the fact the Congress has evidenced its desire and ability to prune this section of unneeded verbiage. At least twice the law was amended to eliminate surplusage.[2]

In addition to the violence which it does to the statutory language, the appellant's argument would thwart the purpose which the government ascribes to the requirement that a jury pass on the imposition of the death penalty. In its brief (note 5, page 9) the appellant indicates that the law as it now stands was favored over alternate proposals because "it took the onus of inflicting death from the judge." If the court must make its own decision in the final analysis anyway it is difficult to see how that onus is avoided.

The only authority cited by appellant representing the view that the jury's decision is not mandatory under the

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2 See 18 U.S.C.A. §1201, p. 113, "Historical and Revision Notes." Reference to persons aiding, abetting or causing was omitted as unnecessary because such persons are made principals by section 2 of Title 18. Still more significant for present purposes was the elimination of the words "upon conviction" preceding the sentencing provisions. This was done because punishment obviously cannot be imposed until a conviction is secured. If the government's reading of this statute were sustained, the phrase "unless the death penalty is imposed" would be equally unnecessary.

statute in question is *Robinson v. United States*, 264 F. Supp. 146 (W. D. Ky. 1967). That decision, however, is of little help in deciding the issue here. It was written after and with knowledge of the opinion of the court below in the present case and simply represents a conflict of opinion between two federal district courts. The view it espouses cannot be accepted.

B. *The Trial Court, Having Accepted A Plea of Guilty, or Having Heard The Case and Having Entered a Finding of Guilty, Is Not Authorized to Convene a Jury Solely For the Purpose of Imposing Sentence.*

The appellant, in support of its view that a jury may be convened for the limited purpose of imposing sentence, relies upon the decision of the Court of Appeals for the Seventh Circuit in *Seadlund v. United States*, 97 F.2d 742 (1938). Neither that case nor this issue have previously been submitted to the Court for determination. For the reasons hereinafter stated, it is our view that the *Seadlund* decision must be rejected.

It cannot be doubted that Congress knows how to provide for imposition of capital punishment when there is no jury to adjudge guilt. 18 U.S.C. §1992, which deals with the wrecking of trains, provides for the death penalty in certain circumstances "if the jury shall in its discretion so direct, or in the case of a plea of guilty, if the court in its discretion shall so order." Similarly, 18 U.S.C. §34 provides for the death penalty in certain situations where crimes involving aircraft, aircraft facilities or motor vehicles are committed. It reads,

> Whoever is convicted of any crime prohibited by this chapter, which has resulted in the death of any

> person, shall be subject also to the death penalty or to imprisonment for life, *if the jury shall in its discretion so direct, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order.* (Emphasis added)

The language employed by Congress in 18 U.S.C. §34 is particularly significant also because it evidently represents an awareness of precisely the problem now under discussion. In a letter to the Chairman of the House Committee on Interstate and Foreign Commerce, prior to the passage of the italicized provision, William P. Rogers, Deputy Attorney General, pointed out on behalf of the Justice Department that the bill then under consideration should be amended.

> Your attention is directed to the penalty provision of subsection (i). It is suggested that the phrase "or in the case of a plea of not guilty where the defendant has waived trial by jury," be added to the bill following the word "guilty" at line 20 on page 3. Under the present phraseology it is doubtful whether the court could invoke the death penalty in a situation where the defendant has entered a plea of not guilty, waived his right to trial by jury, and asked to be tried by the court.[3]

In the decade since the passage of 18 U.S.C. §34, Congress has displayed no desire to write similar provisions into the Kidnapping Act. This Court is hardly in a position to make the amendment on its own.

18 U.S.C. 1201(a) provides for the death penalty only "if the verdict of the jury shall so recommend." These words

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3 2 *U. S. Code Congressional and Administrative News*, 84th Congress, Second Session, 1956, pp. 3149-3150.

alone strongly suggest that only a jury rendering its decision on the issue of guilt is empowered to impose the death penalty. "The verdict" surely refers to the general verdict returned after a trial on the facts. This phrase combined with reference to *the* jury, as opposed to *a* jury, inescapably indicates that the statute contemplates one jury convened to pass on guilt and sentence, or no jury at all.[4]

Nor can it be claimed that the calling of a special jury as allowed under the *Seadlund* decision is a procedure equivalent to that referred to in the statute. In referring to "*the* jury," the statute envisions a jury which is burdened with the responsibility for determining guilt. Such a body may well be less likely to impose capital punishment than a jury which begins its deliberations with the court's assurance that the defendant is guilty. The defendant's jeopardy is increased under the *Seadlund* procedure also by the loss of rights after conviction which he would be free to exercise before a fact-finding jury. For example, the convicted defendant cannot successfully object to evidence, including alleged admissions, of other crimes unrelated to that of which he stands convicted.[5] Such evidence having been held proper, the defendant cannot complain of being forced to take the stand in order to defend himself against such additional allegations.[6] Decisions limiting the right of a defendant in post conviction proceedings to cross-examine those who provide information against him[7] or pass on his mental

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4 See *United States v. Curry*, 358 F.2d 904, 914 (2d 1965), wherein it was said that 1201 is one of several statutes under which the jury is given discretion as to whether the death sentence shall be imposed. The court concluded that "there is no indication that Congress thereby contemplated a two stage trial of guilt and sentence."

5 *United States v. Dalhover*, 96 F.2d 355, 360 (7th Cir. 1938), *certiorari denied*, 305 U. S. 632, involving the procedure for which the government contends, but under a different statute.

6 *Id.*

7 *Williams* v. *New York*, 337 U. S. 241 (1949).

fitness to receive sentence[8] further indicate the extent to which the *Seadlund* procedure may expose the defendant to disadvantages never contemplated by 1201(a).

Still other questions which the Congress might consider relevant in determining the desirability of authorizing such a procedure remain unanswered. Would the convicted defendant have a right to remain silent and not take the stand in a post conviction sentencing proceeding?[9] Would hearsay evidence be excluded? What rules of evidence would apply? Would the state have the right to challenge for cause those prospective jurors who objected to imposing the death penalty? Or is the state allowed to pick only those jurors, for the sole purpose of sentencing, who approve of capital punishment? Would the defendant have the right to counsel at a post conviction sentencing proceeding?[10] Could the defendant have illegally obtained evidence suppressed? Would the violation of the defendant's Fourth Amendment rights be sufficient to require the exclusion of evidence? Would the "verdict" of the jury have to be unanimous or could a majority of the jurors sentence the defendant to death? What would be the standard of proof in such a proceeding? What would the state have to prove? Would it have to prove it beyond a reasonable doubt? Could it prove it with a proponderance of the evidence?

If the statute in question authorizes a proceeding in which the defendant's rights become so uncertain, that result must seem surprising in light of the appellant's repeated assurance that the death penalty provisions of this act are intended to mitigate the risk of capital punishment.

It is not argued here that such considerations necessarily

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8 *Solesbee v. Balkcom*, 339 U. S. 9 (1950).

9 See *Beilan v. Board of Educ.*, 357 U. S. 399 (1958).

10 See *Mempha v. Rhay*, 416 P.2d 104 (Wash. 1966); *cert. granted*, 386 U. S. 907 (1967).

preclude an evenhanded procedure established by legislative authority which would leave all sentencing to juries, or all capital sentences to juries. The problem here is that the statute in question principally envisions a much different jury than that approved in *Seadlund*. The statute would have to be read to provide two very different types of procedures, one of which the Congress has yet to approve and which is not clearly implied by the terms of that law.

Perhaps the most conclusive objection to the special jury is that it is not possible under the procedure endorsed by the appellant to be assured that the special jury will render a free and independent decision in passing sentence. Under the law in question, according to the appellant's argument, a special jury will be convened only where a jury trial was not claimed in the first instance. The court, having entered a verdict of guilty after trial or after the receipt of a guilty plea, will make its independent decision as to whether a jury should be convened. If the jury's decision is to be binding on him, he will convene one *only* if he definitely wants the death penalty imposed. But even if he is thought to retain the discretion to disregard that decision, he will convene the jury only if he wants to impose capital punishment, or if he wants to keep that option open. Any jury worth its salt will contain members who can easily figure out these facts for themselves. Indeed, it is likely that their role in the sentencing procedure will be explained to them by the court in order that they might understand their responsibilities. Can there be any doubt that a jury possessing such a powerful indication of the judge's preferences would be influenced thereby in rendering its decision? If the jury has reason to believe that the court wants capital punishment imposed, it is very likely to follow that implicit recommendation. If the jury realizes only that the court would prefer not to have that alternative foreclosed, might the

jurors not succumb to the easy course of tossing the hot potato back into the court's lap with a recommendation of death? Any hope that such influence would be dispelled by special instructions to the jury is surely illusory. The requirement that the death penalty be imposed only upon the recommendation of the jury is hardly satisfied if the court injects its own implicit recommendation into the jury's deliberations.

None of these considerations is reflected in the *Seadlund* decision. Indeed the court there, without so much as a nod to the significance of its words, spoke of the statute as one by which,

> Congress unquestionably, intended to place a limitation upon the right of the court to impose the death penalty in that before so doing, an affirmative recommendation must be made by *a* jury. (Emphasis added)[11]

We submit that the statute should not be read to mean "*a* jury" when it says "*the* jury." It should not be read to authorize an ill-defined and uncertain proceeding where it was written with reference to one whose characteristics are well known. Nor should it be read to deny the accused a free and unfettered jury where his life is at stake.

II. *THE PRICE EXACTED BY THE KIDNAPPING ACT FOR THE EXERCISE OF A DEFENDANT'S FIFTH AND SIXTH AMENDMENT RIGHTS CONSTITUTES AN UNCONSTITUTIONAL BURDEN ON THE ASSERTION OF THOSE RIGHTS.*

The appellant asserts that the Kidnapping Act does not burden the assertion of the defendant's rights. It has been

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11 97 F.2d at 748.

demonstrated above that this is simply not so. Even under the assumptions most favorable to the government's argument a very real burden remains. Once it is clear that the underpinnings of the appellant's view will not hold up, the price tag on the rights of the accused grows still larger. The real thrust of the appellant's position, therefore, is that the burden imposed by this law is not unreasonable and not unconstitutional. Claiming that the procedure for imposing capital punishment operates "to mitigate the severity of punishment," (Brief page 7), the appellant asks the court to overlook the fact that such a procedure "may have the incidental effect of inducing defendants not to contest in full measure" (Brief page 9). An adequate safeguard is said to exist in that the trial judge will remain alert to the coercive effect of the statute and will "refuse to accept a plea or waiver that is not the product of unfettered choice." To say that the adequacy of such a safeguard is less than obvious is a massive understatement. Nor is the appellant's argument that the death penalty provisions in this statute are designed to favor the accused very conclusive. The appellant's own argument (note 5, pages 8 and 9) reveals that the capital provisions were added two years after the passage of the original act. This action could just as easily be interpreted as representing an attempt to supply a bit more incentive for defendants to waive their rights.

Whatever the purpose in the minds of the legislators, the effect of their decision is already clear. Under the decisions handed down by this and other courts in analogous situations, that effect is one which falls within the implied prohibitions of the United States Constitution.

This Court in *Fay v. Noia*, 372 U.S. 391 (1963), clearly recognized that the conditioning of a procedural right on the *possibility* of death, compared to the certainty of life imprisonment, is not to be lightly dismissed. In that case Noia

and two companions were convicted of murder. The companions were sentenced to death while Noia received only a life sentence. His companions were more than willing to appeal. But Noia faced a grim decision. If he appealed successfully he might be retried. If reconvicted, he could be sentenced to death. Understandably he chose not to appeal. His companions, however, were successful. The exclusion of their confessions prevented their re-conviction. Noia, feeling his legal position sufficiently improved to run the risk of the death penalty, attempted to appeal his own convicion. The state courts held him barred for failure to make a timely motion to appeal on the theory that he had waived his rights. This Court rejected the view of the state courts since Noia's decision not to appeal could hardly be considered the result of his own free choice.

> For Noia to have appealed in 1942 would have been to run a substantial risk of electrocution. His was a grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence. . . . He declined to play Russian roulette in this fashion. 372 U.S. at 439-40.

The government now contends that a choice very similar to that facing the defendant in *Fay v. Noia* imposes no unreasonsable burden on the appellees' free choice. How heavy such a burden must be before the appellant would consider it unreasonable is hard to tell.

Other decisions of this Court and of lower federal courts and state courts have recognized in various contexts that the state may not put a price on the exercise of a constitutional right, the effect of which is to discourage, even indirectly, the assertion of those rights.

Griffin v. California, 380 U.S. 609 (1965), held that comment by a prosecutor on the failure of the accused to

testify unacceptably curtailed the exercise of the Fifth Amendment right of silence. The appellant here argues that *Griffin* is not on point because in the present case the requirement of a jury's recommendation before capital punishment can be imposed was devised to mitigate the severity of punishment, not to confound the defendant in exercising his rights. Even if that congressional intent were clear — and it is not — it could hardly justify curtailment of a constitutional right.

The principle adhered to in *Griffin* was implied in the earlier case of *Green v. United States*, 355 U.S. 184 (1957). There the petitioner had been convicted of arson and second degree murder. He was sentenced to a term of years in prison. After a successful appeal, remand and retrial, he was convicted again and sentenced to death. This court reversed the conviction on the capital charge of first degree murder as a violation of the prohibition against double jeopardy, holding that the greater crime had been included within the scope of the jury's consideration at the first trial. The verdict of guilty on second degree murder implied an acquittal of the first degree murder charge. Mr. Justice Frankfurter, however, pointed out in his dissent that the real holding of the Court was that the right to appeal could not be conditioned on the possibility that success could be rewarded with a heavier penalty.[12] The majority said as much in pointing out that,

> stated in the terms of this case, he [the defendant] must be willing to barter his constitutional protection against a second prosecution for an offense punishable by

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12 At least one commentator has concluded that the double jeopardy point served chiefly as a device for protecting Green's statutory right to appeal, rather than his constitutional right to be safe from repeated prosecution. Van Alystyne, "In Gideon's Wake," 74 *Yale L.J.* 606, 630 (1965).

> death as the price of successful appeal from an erroneous conviction of another offense for which he has been sentenced to five to twenty years imprisonment. As the Court of Appeals said in its first opinion in this case, a defendant faced with such a "choice" takes a "desperate chance" in securing the reversal of an erroneous conviction. The law should not, and in our judgment does not, place the defendant in such an incredible dilemma. 355 U.S. at 193.

What was implicit in *Green* became explicit on the state level in the well-reasoned opinion of Justice Traynor in *People v. Henderson*, 60 Cal.2d 482, 386 P.2d 677 (1963). In a case factually similar to Green, the California court said that,

> A defendants' right to appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right. Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal.[13] 386 P.2d at 686

Appellees urge this court to apply that principle to the present facts. The burden imposed on the rights here in question can hardly be thought less weighty than that imposed in the foregoing cases. Furthermore, it should be recalled that the right held to have been penalized in those decisions was a statutory right — the right of appeal. How much more cautious must we be to protect rights written into the Constitution.

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13 This principle was held applicable to the states through the due process clause of the Fourteenth Amendment by then Judge Mashall of the Second Circuit in *United States ex rel Hetenzi* v. *Williams*, 348 F.2d 844 (2d Cir. 1965).

Other cases have prohibited even the indirect restriction of constitutional rights by forcing a citizen to a choice between that right and some benefit. *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967), *Cramp v. Bd. of Public Instruction*, 368 U.S. 278 (1961), and *Wieman v. Updegraff*, 344 U.S. 183 (1952), held that the privilege of working for the state could not be conditioned upon loyalty oaths which, because of their vagueness and extreme breadth, might cause a teacher to be inhibited in the exercise of his First Amendment rights. Certainly the risk that the free exercise of a defendant's rights will be inhibited in the present case is no less significant than in those cases.[14]

Fifth Amendment rights were directly involved in *Slochower v. Board of Higher Educ.* 350 U.S. 551 (1956). There this court held that public employment could not be terminated by reason of the employee's assertion of his Fifth Amendment rights before a legislative committee. The exaction of such a price for the exercise of a fundamental right was held to be unconstitutional. How much clearer must be the case where the price is the increased risk of death.

The sound policy promoted by the cited decisions is that those fundamental rights which are preserved expressly or implicitly to the people by their Constitution are to be protected not only against their abolition, but against their piece-meal emasculation as well. No one contends here that the constitutional rights of the appellees should not be pre-

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14 See also, *Shelton v. Tucker*, 364 U. S. 479 (1960), holding that the state could not condition employment upon an overly broad requirement that the teacher disclose all his associations when the effect of such a requirement was to inhibit freedom of association; *Speiser* v. *Randall*, 357 U.S. 513 (1958), holding that the right to a tax exemption for veterans could not depend upon a condition that violated the constitutional presumption of innocence.

served. But the appellant's view if upheld would force the accused to think long and swallow hard before daring to assert them.

III. *ONCE THE EFFECT OF 18 U.S.C. 1201(a) IS HELD UNCONSTITUTIONAL, THE INDICTMENTS THEREUNDER MUST BE DISMISSED.*

Once it is decided that the Kidnapping Act, as it stands, imposes an unconstitutional burden on the assertion of a defendant's Fifth and Sixth Amendment rights, the court must either invalidate the entire section or re-write it into a constitutionally acceptable form. The appellant argues that the latter course is preferable. According to the government's brief, the obvious decision for the Court to make is to delete the provisions governing the imposition of capital punishment from the statute. But is that choice so clearly correct? We think not.

Deletion of capital punishment is, indeed, one possible way of removing the Kidnapping Act's constitutional infirmities. But the same result could be achieved by authorizing the trial court to impose capital punishment at its discretion in all cases, by making that penalty mandatory upon conviction, by rejecting all pleas and waivers and convening a jury to decide all issues in every case, or by convening a special jury to determine the imposition of the death penalty in all cases. In fact, assertion of the right to trial by jury could be encouraged by empowering only the jury to recommend clemency. It is doubtful that this Court would claim or desire the authority to select and establish any of the last five alternatives. But to accept the appellant's recommendation would be to amend and re-write this statute as surely as would the selection of any other alternative.

The Court below was correct in dismissing the first count of the charges against the defendants. The court was not in a position to rewrite the statute in order to sustain the indictment. The government now asks that this Court invalidate "only the offensive provision" of the statute. (Appellant's Brief 13) As authority for this position the appellant relies on *Champlin Rfg. Co. v. Commission*, 286 U.S. 210, 234 (1932): ". . . the invalid part may be dropped if what is left is fully operative as a law." We agree with the Court's position in *Champlin*. We wish to point out, however, that the holding in *Champlin* will sustain only those statutes from which a whole section can be severed. *Champlin* does not stand for the proposition that a court, when declaring a provision invalid, should rewrite the statute by changing its terms, altering its procedures and amending the penalty so that the statute as a whole can survive. The principle in *Champlin* provides for severability only where (1) a whole section can be invalidated without affecting the other sections *and* (2) where Congress has specifically stated that any provision shall be considered severable from the act as a whole. What the government fails to point out, in relying on *Champlin* and *United States v. Harriss*, 347 U.S. 612, 627 (1954), is that in both of these cases the statutes involved contained severability provisions.[15]

In general, there are three ways for the Court to dispose of a case in which a statute or procedure has been declared

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15 In *Champlin*, immediately after the statement quoted by the appellant in this case, the Court went on to say,

> Section 10 declares that the invalidity of any part of the Act shall not in any manner affect the remaining portions. That discloses an intention to make the Act divisible and creates a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained. . . . 286 U.S. at 235

In *United States* v. *Harriss*, also relied on by the appellant, the Federal Regulation of Lobbying Act also contained a separability provision.

unconstitutional: (1) It might sever and invalidate the offending provision or procedure, leaving the remainder of the statute intact; (2) It might invalidate the entire statute, or; (3) It might void the proceeding below, order it stripped of its objectional features, and remand. The third alternative has no application here. The Court is not now called upon to judge the propriety of a past proceeding. The first alternative is conceptually available here but, for the reasons set forth immediately below, it cannot be employed. Only the invalidation of the entire section can satisfactorily dispose of the statute's offensive characteristics without forcing the Court to make legislative decisions.

An offensive provision should be severed and invalidated separately only if two requirements are met: (a) The statute or procedure, when the invalid portion is removed, must remain unaffected in meaning and purpose, and (b) the statute should contain a separability provision indicating the legislature's opinion that half a loaf is better than none.

The *Champlin* decision provides a good example of a situation in which these requirements were satisfied. Out of an act with ten separate provisions only one was invalidated. The court did not have to rewrite the act. No alterations were necessary — no commas were moved, no decisions about penalties were made and the court amended no procedures. In addition, the act had a separability provision. The kidnapping law, however, is not like the statute in *Champlin*. To hold that the "remaining part" of the statute is still valid, this Court must make a number of legislative decisions. The provision in question is but a single sentence. The court must drop some words and move the punctuation marks. But more importantly, the court must perform the legislative function of deciding what the penalty provisions should be. Which of the half-dozen possible procedures should be adopted? Any of them would remove our

constitutional objections. The uncertainty which must accompany the selection of any available alternative is compounded by the absence of a separability clause. Where there is no separability clause, the presumption is against severance.[16]

This Court, then, should not rewrite Section 1201(a) but should declare that provision unconstitutional, affirm the judgment below, and leave it to Congress to rewrite the statute if it so desires.

Most cases before the Supreme Court where a statute has been declared invalid have been disposed of in this manner. If we are to take the appellant's suggestion seriously, we can only wonder why the Court did not rewrite the loyalty oath in *Cramp v. Board of Public Inst.*, 368 U.S. 278 (1961), in order to eliminate its vagueness. Why did this Court not rework the Feinberg Law in New York in order to preserve all the features not declared unconstitutional in its decision in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967)? Also, it would have been a simple matter to shift the burden of proof onto the state in *Speiser v. Randall*, 351 U.S. 513 (1958), but this court did not perform the function of rewriting an unconstitutional statute to save the provisions not declared invalid. Could this Court have written a new disclosure statute in *Shelton v. Tucker*, 364 U.S. 479 (1960)? It did not. And this case should be disposed of in the same manner as the cases mentioned above.

The course recommended by the appellant requires second-guessing the Congress. Where the legislature has drafted a penal statute whose effect, intended or not, is to intimidate citizens in the exercise of their rights, it is some-

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16 *Electric Bond & Share Co. v. Commission*, 303 U. S. 419, 434 (1938).

what difficult to understand why this Court should wend its way through the subsections and sub-subsections of the offending statute, striking words and moving commas, in order to preserve as much of that law as the Congress might have done had it concerned itself earlier with the preservation of those rights.[17]

CONCLUSION

The judgment of the district court should be sustained.

Respectfully submitted,

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John A. Walsh, Jr.

October 1967

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17 We wish to acknowledge the able and indispensable assistance of David Broiles, a student at the Yale Law School.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 85

UNITED STATES OF AMERICA,

Appellant,

—v.—

CHARLES JACKSON, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE, CHARLES JACKSON

Opinion Below

The opinion and order of the district court (R. 15-19) are reported at 262 F. Supp. 716.

Jurisdiction

The order of the district court dismissing count one of the indictment on the ground of the unconstitutionality of the statute upon which the indictment was founded was entered on January 9, 1967 (R. 18-19). Notice of appeal

to this Court was filed by the Government on February 6, 1967, and probable jurisdiction was noted on May 29, 1967 (387 U.S. 929; R. 25). The Government invokes jurisdiction of this Court under 18 U.S.C. §3731.

Statute Involved

18 U.S.C. 1201(a) provides:

> Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, *shall be punished* (1) *by death if the kidnaped person has not been liberated unharmed,* and *if the verdict of the jury shall so recommend, or* (2) *by imprisonment for any term of years or for life,* if the death penalty is not imposed. (Emphasis supplied)

Question Presented

Whether the Federal Kidnaping Act, 18 U.S.C. §1201(a), violates the Fifth and Sixth Amendments because it provides for the death penalty (where the victim has been harmed) "if the verdict of the jury shall so recommend," but imposes no death penalty otherwise.

Statement

Appellees were indicted in two counts on October 10, 1966. Count one charged that they had transported in interstate commerce from Milford, Connecticut, to Alpine, New Jer-

sey, in violation of 18 U.S.C. §1201(a), one John Joseph Grant III, an individual whom they had kidnaped to help them escape arrest, and that the victim was harmed when liberated (R. 1). By bills of particulars, the government specified that the victim had suffered lacerations of the wrist, hands and arms while being tied and while freeing himself (R. 3; R. 14). (Count two charged the transportation in interstate commerce of a stolen motor vehicle, in violation of 18 U.S.C. 2312. It is still outstanding.)

Appellee Jackson moved to dismiss the indictment on the grounds that §1201 puts the defendant to an unconstitutional choice in that it immunizes those who plead guilty against a death penalty but requires defendants who demand trial by jury to risk their lives. Jackson argued in the alternative that the statute was void for vagueness and also that in authorizing the death penalty for relatively trivial crimes it ran afoul of the Eighth Amendment's prohibition of cruel and unusual punishment (R. 7-13). The district court (Judge Timbers, Connecticut District) did not reach the latter two contentions, for it ordered count one of the indictment dismissed on the ground that the statute, in permitting the death penalty only upon recommendation of the jury and making such a recommendation mandatory, tended to deprive defendants of their "fundamental Sixth Amendment right to trial by jury" (R. 17), and was therefore invalid. The court reasoned that if defendants claim trial by jury "they must risk their lives," whereas if they waive a jury or plead guilty, that "risk is at least substantially reduced" because the judge in the latter case has discretion not to convene a jury and thus to eliminate the risk of a death penalty. Even if a court after accepting a guilty plea has authority to con-

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE APPELLEE, CHARLES JACKSON

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vene a jury to determine punishment,[1] the court held, "that power is discretionary, its exercise uncertain" (R. 18). Consequently, one who waives a jury or pleads guilty substantially reduces, if he does not avoid entirely, the risk of a death sentence. The court concluded that exercise of one's Sixth Amendment rights were made "no less costly" by §1201 than assertion of one's Fifth Amendment right not to testify was made costly by comment in *Griffin* v. *California*, 380 U.S. 609, 614. It thus held that §1201(a) is invalid "to the extent that it impairs defendants' free exercise of their right to trial by jury" (R. 18).[2]

Summary of Argument[3]

The Fifth Amendment guarantees a defendant in a criminal case "Due Process of Law" and immunizes him against compelled self-incrimination. The Sixth Amendment vests in him a right to trial by jury. All of these fundamental constitutional rights are infringed by a statute which conditions his freedom to exercise them upon his risking the death sentence. This Court held that comment upon the defendant's failure to take the stand imposed an impermissible price upon the exercise of Fifth Amendment rights in

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[1] The court found it unnecessary to decide whether a judge who accepts a guilty plea has any authority to convene a jury to impose the death sentence, an issue upon which, the court noted, the Circuits are divided.

[2] Count one was dismissed not only as to the defendant Jackson but also as to his codefendants and co-appellees, Walsh and De LaMotte.

[3] We wish to acknowledge the heavy debt owed in the preparation of the argument to Cornelius J. Moynihan, Jr., of the Boston Bar, court appointed counsel for the defendant in *United States* v. *Holden*, No. 6809, District of New Hampshire, and, for uncompensated research, to William Hamilton, Douglas Nohlgren, and Paul Strasburg, students of the Yale Law School.

Griffin v. *California, supra,* even though it could not be proved that in a particular case the comment was prejudicial. The price imposed upon equally basic rights by §1201 is plainly a higher price and a heavier burden upon the exercise of the right to trial than was the penalty in *Griffin.* In holding §1201 invalid, therefore, there was no new or novel principle espoused or applied below.

The Government contends that the penalty provision of §1201 was designed to and has the effect of "mitigating the severity of criminal punishment" and, apparently, that the defendant should have nothing to complain about. Yet the original Kidnapping Act did not permit the death penalty. It is difficult to see, therefore, how the later amendment authorizing the death penalty can be regarded as a mitigation of punishment. In any event, the search for Congressional motives is irrelevant. If a statute materially burdens the exercise of constitutional rights it is invalid, especially where, as here, the burden includes an enhanced risk of death and there are no significant countervailing policies behind the provision.

Section 1201 properly and fairly construed does not permit the execution of one who pleads guilty. That penalty is reserved for those brazen enough to demand a trial. However, even if a judge after accepting a guilty plea has authority to convene a sentencing jury, the exercise of that authority is discretionary, whereas the judge has no authority in a case in which guilt is contested to prevent the jury from imposing the death penalty (provided there is evidence of harm). Thus, the defendant who pleads guilty is at least insulated from a jury's sentence of death by judicial discretion; the defendant who goes to trial has no such protection.

The Government attempts to equate the two procedures by arguing that the Court may construe the statute to require the judge to concur with the jury's decision before the death penalty can be imposed. Yet the language of the statute, its legislative history, and virtually all judicial authority precludes such a construction. Moreover, even if the Court were to rewrite the statute and give the judge discretion to treat the jury's role in sentencing as advisory only, the procedures for defendants who plead guilty and for those who do not are still very disparate, to the disadvantage of the latter. Thus, whatever construction is put on the statute, it imposes an unconstitutional penalty upon defendants who exercise their Fifth and Sixth Amendment rights.

The lower court was correct in holding the entire statute invalid. To excise the death penalty provisions only would have undesirable consequences and would partake of legislation in view of the fact that Congress, by amending the Act two years after its passage, clearly evidenced dissatisfaction with the statute in its original form, to which it would be returned by invalidating merely the death penalty provision. Even if the substantive provisions can legitimately be upheld, moreover, the entire penalty provision must fall. The offending provision is not merely that segment of the statute which authorizes the death penalty, but the entire penalty provision. The portion which provides a term of imprisonment where there is no jury recommendation is an essential ingredient of the inducement to a defendant to forego his constitutional rights. Were there no term of imprisonment authorized, if death was the only permissible penalty, the statute would not contain the defect it now carries, the defect lies in the disparate penalties,

neither of which, in or by itself, is constitutionally infirm. Therefore, if the offending provision is to be severed, it is the entire penalty provision rather than merely a piece.

ARGUMENT

I. A Statute Which Substantially Increases the Hazard of the Death Penalty for a Defendant Who Exercises His Fifth and Sixth Amendment Rights Is Invalid as Violative of the Fifth and Sixth Amendments.

The Government reads the lower court's opinion as holding that "any procedure for mitigating the severity of criminal punishment is invalid if, to invoke the procedure, the defendant might be induced to forego a constitutional right" (Brief, p. 6). Such a principle is said to have ominous implications, including what the Government regards as the *reductio ad absurdum*—outlawing guilty pleas to reduced charges. Yet nothing in the opinion of the district court announces such a broad principle; neither does the decision of the court need to rest upon it. In the first place, the death penalty provision of §1201 is not a "procedure for mitigating the severity of criminal punishment" as the Government labels it. Furthermore, a statutory scheme which significantly increases the probability of a death sentence for one who refuses to waive his Fifth and Sixth Amendment rights differs both in degree and kind from a judge's decision to accept a plea to a lesser offense than that originally charged.

There are doubtless procedural doctrines which test the outer limits of the principle applied in *Griffin* v. *California*,

380 U.S. 609, and other decisions of this Court,[4] that prices cannot be put on constitutional rights, but the procedures at issue here—the penalties imposed by §1201—are not in this penumbra where the penalty is insubstantial and equally basic rights conflict. The court below correctly considered §1201's invalidity to flow *a fortiori* from *Griffin*. When a defendant is compelled to risk his life as a condition to exercising his constitutional rights, there is no room for *de minimis;* nothing paltry about the price. For the validity of such a penalty even to be arguable, the countervailing policies served by the penalizing provision should be powerful and themselves anchored upon and in aid of other fundamental rights.[5] The provision invalidated below serves no such aim. We thus agree with the Government that in this case it is not "necessary to adopt an absolute prohibition of all procedures that may contain

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[4] *E.g., Miranda* v. *Arizona,* 384 U.S. 436, 468 (n. 37); *Spevack* v. *Klein,* 385 U.S. 511; *Garrity* v. *New Jersey,* 385 U.S. 493; *Sherbert* v. *Verner,* 374 U.S. 398, 403-406; *Green* v. *United States,* 355 U.S. 184, 193-194.

[5] The conflict between the right to a speedy trial and the right to a jury unbiased by press coverage, alluded to by the Government (Brief, p. 10, n. 6), is an example of procedural doctrines which unavoidably penalize constitutional rights yet are arguably valid. Federal Rule of Criminal Procedure 16(c), permitting the court to condition pre-trial discovery upon the defendant's own disclosure, is possibly another. But see statement of Mr. Justice Douglas, dissenting in part to adoption of amendments to Rules, 383 U.S. 1089.

On the other hand, it is well-settled that if it can be established that a judge sentenced a defendant more heavily merely because he elected to stand trial, the sentence is invalid. *United States* v. *Wiley,* 278 F.2d 500 (7th Cir. 1960); *Thomas* v. *United States,* 368 F.2d 941 (5th Cir. 1966). Likewise, if the prosecutor or the court threatens to impose a heavier sentence upon a defendant for failing to plead guilty, a guilty plea so induced is not a valid plea. *Machibroda* v. *United States,* 368 U.S. 487, 493; *United States* v. *LaVallee,* 319 F.2d 308 (2d Cir. 1963).

some potential of inducement to forgo a constitutional right" (Brief, p. 9). Our agreement is founded, however, on the firm belief that the decision of the court below needs no such absolute principle to sustain it.

The penalty provision of §1201 can easily be distinguished from a prosecutor's decision to reduce a charge prior to the entry of a guilty plea. The occasions when a charge will be reduced and a guilty plea entered fall generally into two categories: (1) the defendant is innocent of the more serious original charge and the prosecutor amends the charge to conform to the crime actually committed; (2) the defendant is guilty of the higher offense but the charge is lowered to induce a guilty plea. A court has no feasible way to determine which of these two circumstances, or what mixture of each, actuated a particular reduction. Yet it is only the latter situation which provides a substantial inducement to a guilty plea and permits the prosecutor to pressure the accused into foregoing his right to trial. A defendant initially charged with an offense of which he is clearly innocent (the first situation) will hardly consider the prosecutor's willingness to amend the charge as a material factor in deciding whether or not to plead guilty. If there is a plea, the reduction of the charge and the guilty plea may be causally independent decisions—the prosecutor will often reduce the charge in such a case even if the defendant persists in his not guilty plea. Thus, it is only a fraction of "overcharges" which constitute threats or inchoate penalties for going to trial. Reduction of the charge and entry of a guilty plea are no evidence that the case is one type rather than the other. Moreover, there is no known empirical evidence which suggests what proportion of plea reductions are in each category. Even if there were,

the proportions would differ from one prosecutor to another, and even from one offense category to another. To suppose that most of such occurrences are of the latter type—inducements to plead guilty—would be to indulge in speculation.[6] With §1201, on the other hand, the price tag on Fifth and Sixth Amendment rights is in the statute itself, applicable in every kidnapping case.[7] It cannot, therefore, be equated with charge reductions.

There is a second flaw in the Government's analogy. The penalty imposed by §1201 is eliminable simply by invalidating the statute. This would not "rob the criminal process of much of its flexibility" nor "lead generally to heavier penalties" (Brief, pp. 6, 7), as the Government claims would be the case if a judge could not accept a guilty plea to a reduced charge. Whether the charge reduction process is even amenable to effective judicial scrutiny is problematical. If the Court were to undertake to eliminate the possibility that an overcharge might induce a defendant to plead guilty, it would have to hold not only that a guilty plea to a reduced charge is invalid, but that the prosecutor has no power to amend charges in an indictment nor to reindict after voluntary dismissal. A prosecutor could often avoid even this constellation of restrictions by negotiating with the defendant before the initial charge is framed. The charging process, therefore, may be largely beyond the reach of courts.

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[6] *Cf.* Rubin, Criminal Justice in a Metropolitan Court 47-48. (Office of Criminal Justice, U.S. Dept. of Justice, 1966.)

[7] Even, it should be noted, when the indictment does not allege that the victim was harmed, for this Court held that kidnapping may be punished by death if the proof shows harm even though harm was not alleged. *Smith* v. *United States,* 360 U.S. 1.

If there is no feasible way for this Court to effectively outlaw pleas to reduced charges, the evils envisaged by the Government in judicial attempts to do so are plainly exaggerated if not imaginary. Even if such pleas could be effectively outlawed, moreover, there is no reason to believe that this would "almost certainly lead to generally heavier penalties" (Brief, p. 7), or that it would "most often work to the harm of the accused" (Brief, p. 9).

In many federal districts, charge reductions are relatively rare, yet we doubt that there is a discernible disparity in the ratio of guilty to not guilty pleas in such districts and in districts where charge reductions are common. Neither, we believe, is there a significant difference in the average sentences in districts where plea reduction is common and where it is not. There is neither evidence nor logic behind the Government's assumptions.

The only instance in which eliminating pleas to reduced charges might seem to "work to the harm of the accused" would be where a prosecutor is inclined to charge the defendant initially with the crime which he clearly committed, then later reduce to a lesser offense as part of a plea bargain. As noted above, the number of occasions in which this actually occurs is unknown. In some federal districts, *e.g.*, Connecticut, such a practice is infrequent. Even where this is the case, however, it is difficult to see what legitimacy can be claimed for procedures which permit one who is guilty of armed robbery to plead guilty to petty theft. A prosecutorial decision to reduce the charge in such a case and the plea of the defendant are both in clear contravention of the legislative will expressed in the definition of crimes. If it is thought undesirable for an accused to be convicted of the crime of which he is actually guilty, this

is an issue best addressed to the body which defines offenses. Moreover, even if charge reductions were eliminated, the prosecutor could avoid much of the "harm" to the accused by initially charging only a lesser included offense which the defendant committed. About all that would be confined by outlawing charge reductions, therefore, would be the freedom of the prosecutor to induce the defendant to plead guilty to a crime which he did not commit. Such discretion hardly lies at the base of our institutions.

Eliminating charge reductions would, as the Government suggests, deprive "the criminal process [*i.e.* the prosecutor] of much of its [*i.e.* his] flexibility" (Brief, p. 6), in that mistakes in overcharging an accused could cost the prosecutor a conviction because he would be unable to prove his case. Yet surely the inducement that such a risk would provide a prosecutor for investigating the case before framing the charge is not easily perceived as a blow to liberty nor as a backward step in this Court's efforts to civilize and legalize the criminal process.

In sum, there is nothing in the case before this Court which calls into question the validity of a guilty plea to a reduced charge, and the Court ought not to decide that question before it arises by accepting the Government's unsupported and unwarranted assertions that elimination of charge reductions would produce "harm" to the accused, more severe penalties, or other undesirable consequences.

Although the district court concluded that §1201 infringes the defendant's "fundamental Sixth Amendment right to trial by jury", it is manifest that since the statute has a substantial tendency to induce a defendant to plead guilty rather than demand a trial, it infringes his Fifth Amendment right to Due Process because it coerces a guilty plea

and tends to deny him the right to a trial guaranteed by the Due Process Clause; it is also, like the comment invalidated in *Griffin*, an infringement of the Fifth Amendment right against self-incrimination, for a guilty plea which is not voluntary is coerced self-incrimination of the first magnitude. It is thus too narrow a view of the matter to focus upon the effect which §1201 has upon the defendant's exercise of the right to have his guilt decided by jury rather than by the court, and we do not understand this to have been the intent of the district judge. The judge was correct, therefore, in concluding that it was irrelevant that the Government might have some power to prevent the defendant from waiving his right to jury trial under *Singer* v. *United States*, 380 U.S. 24, 34-38.[8]

It is also beside the point that the defendant has no absolute right to plead guilty. The plain fact is that judges do accept guilty pleas, and so long as a defendant is in a position to submit a guilty plea, he is strongly encouraged by §1201 to do so. Nor would the problem be avoided, as attempted by the District of Columbia Circuit Court in 1913, by holding that no guilty plea may lawfully be entered under a statute like §1201. *Green* v. *United States*, 40 App. D.C. 426 (1913). So long as judges remain *free in fact* to accept guilty pleas under the statute, the threat of §1201 remains.

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[8] The prosecutor's power to prevent the defendant from waiving a jury trial and thus possibly avoiding a death sentence, assuming *arguendo* that he has such power, effects only one way in which the defendant may seek to avoid a jury; it does not prevent the defendant from avoiding a jury by pleading guilty. Moreover, the defendant's hope that the prosecution will acquiesce in his efforts to avoid a jury and the death penalty will usually be fulfilled. The fact that the defendant has no absolute power to avoid the death penalty by pleading guilty or waiving a jury is therefore insignificant in assessing the real hazards he faces.

II. The Penalty Provision of the Kidnaping Act Exposes the Defendant Who Claims His Fifth and Sixth Amendment Rights to a Materially Greater Risk of the Death Sentence Than the Defendant Who Surrenders Those Rights, and Is Therefore Invalid.

The Government's main contention is that §1201 does not "constitute a significant burden upon assertion of the right to a jury trial" (Brief, p. 10). We turn, therefore, to that phase of Appellant's argument.

The Government seems to regard as relevant its view that the death penalty provision in §1201 is an "ameliorative measure", that it "reflects the movement . . . against the death sentence" (Brief, p. 7), and that, apparently because Congress failed to exert the last measure of its Draconian power, this provision is the product of humanitarian impulses and is a boon to the accused who faces prosecution under §1201. As the Government sees it, "the short of the matter is that the provision requiring the jury to authorize the death penalty is designed to minimize, not to increase, the occasions of its imposition" (Brief, p. 6). In view of the fact that the original Kidnapping Act did not permit the death penalty at all (47 Stat. 326) and that it was amended two years later to call for the death penalty whenever the victim "has not been liberated unharmed, and . . . the verdict of the jury shall so recommend" (48 Stat. 781), we find the Government's interpretation of Congressional motives difficult to comprehend. The real short of the matter, however, is that even if the motive of Congress in amending the Kidnaping Act to call for the death penalty could be distilled from the legislative history, which it cannot, whether that motive was pure and enlightened or perverse and retributive would be immaterial. If

the effect of the statute is to place a substantial burden upon the assertion of Fifth and Sixth Amendment rights, the statute is invalid.

The Government contends that a defendant charged with kidnaping does not significantly enhance the hazard that he will receive the death penalty by demanding a trial; that, conversely, he does not reduce that risk appreciably by pleading guilty or by waiving a jury. It reaches this conclusion only by tortuous reasoning and by disregarding authoritative interpretations of the statute and basic canons of construction.

It should be noted that the statistics cited by the Government tend to refute rather than to supports its claim. As reported in the Government's Brief (n. 9, p. 11), ten defendants have been sentenced to death under the Kidnaping and Bank Robbery Acts, 5 after pleading guilty, 5 after a trial. Yet since the ratio of guilty pleas to trials has been about 2 to 1 (389 plead guilty or no contest to kidnaping between 1951 and 1966, and only 174 plead not guilty),[9] it

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[9] A precise ratio cannot be ascertained from the figures provided in the Government's Brief, because no account is taken of those who were acquitted. This figure, however, is surely not substantial enough to alter the ratio significantly. The figures from which the 2 to 1 ratio were obtained, moreover, are those for the kidnaping offense only, whereas we are not told by the Government which of the ten sentenced to death under the Kidnaping and Bank Robbery Acts were in the former category. However, since 4 defendants have been sentenced to death under the Kidnaping Act since 1951, it seems likely that virtually all of the ten referred to were sentenced under §1201: And if we include in determining the ratio the pleas under the Bank Robbery Statute, the ratio becomes 4 to 1. (4079 defendants plead guilty or nolo to kidnaping or bank robbery, 966 went to trial. Yet half of those ordered executed were among the 966 who went to trial.) Although the ratio when so determined is more striking than that obtained by including only the kidnaping figures, it is probably less meaningful, since most bank robberies are non-capital offenses.

follows that defendants who plead not guilty received the death penalty twice as often as those who waived their rights to trial. If all the facts were known, the disparity would probably be even greater, for those defendants who inflicted grievous harm or death upon their victims probably tended to plead guilty—because the death penalty was more likely—than those whose offenses were less serious. Thus, although most of the factually serious offenses were probably dispose of by guilty pleas, the less serious by trials, defendants in the latter group still suffered the extreme penalty twice as often as those in the former.

The issue cannot be resolved by the statistics, however, but must be drawn from the statute. There, the magnitude of the risk to those who demand a trial is even clearer than is suggested by the statistics.

As the Ninth Circuit reads §1201, a defendant who pleads guilty runs no legal risk whatever of the death penalty, for there is no jury authorized to recommend the death penalty, *Waley* v. *United States*, 233 F.2d 804, 806 (9th Cir. 1956), *cert. den.* 352 U.S. 896 (1956) (*dictum*). This reading of the statute is correct. In specifying the death penalty "if the verdict of the jury shall so recommend", Congress clearly had in mind the twelve men who determined guilt or innocence. Indeed, one can comb the Code today for some provision authorizing or even referring to the empaneling of a jury solely to determine sentence, and he will find none. As the Government notes, the traditional practice in 1934, when the provision was enacted, was to leave sentencing to the court (Brief, n. 5, pp. 8-9). The legislative history of the provision contains no reference to sentencing by a jury other than contemporaneous with the determination of guilt in a trial. The Government has

cited, moveover, virtually no evidence that in 1934 or prior thereto, the practice of convening a special penalty jury existed or had been employed in the federal system or even in the States.[10] Federal Rules of Criminal Procedure 23 and 24 refer only to "trial jurors" and clearly contemplate by the term "jury" itself a body of men who decide disputed facts. It is submitted therefore, that the correct interpretation of §1201 is contrary to that espoused by the Government

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[10] The only pre-1934 decision cited by the Government (Brief, n. 8, p. 11) in support of the proposition that §1201 permits the judge, after a plea of guilty, to empanel a jury for sentencing, is *State* v. *Best*, 44 Wyo. 383, 12 P.2d 1110 (1932). In that case, however, the statute in question made the death penalty mandatory "unless the jury . . . qualify their verdict by adding thereto, 'without capital punishment.'" The defendant, after pleading not guilty and after the trial jury was empaneled, changed his plea to guilty and requested permission to offer evidence in mitigation of sentence. On appeal, he merely argued that a guilty plea should not have been permitted. Under the statute, it will be noted, the death penalty could be *averted* only if a jury was empaneled. Interestingly, the appellate court mentioned in passing that one could argue that no jury could be empaneled in a guilty plea case and that the death penalty would thus be mandatory. It preferred the more "liberal" view. The case is little support for the proposition advanced by the Government in this case.

The other State case relied upon by the Government, *State* v. *Belton*, 48 N.J. 432, 226 A.2d 425 (1967), is precisely contrary to the proposition for which it is cited. As that case reveals, in New Jersey a "guilty" plea is not acceptable in a first degree murder case and the penalty for first degree murder is death unless the jury recommends life imprisonment. However, the court may accept a plea of "non vult" or "nolo contendere" in its discretion, and when it does, no death penalty can be imposed. Thus, if the defendant enters and the court accepts what is tantamount to a guilty plea in New Jersey, no jury is empaneled for sentence determination and no death penalty can be imposed. *Id.* at 427. The law is likewise in New York. New York Penal Law §1045 (If defendant pleads guilty to first degree murder he cannot be given the death sentence; if he pleads not guilty he may, provided court and jury concur).

It is also of interest that in perhaps the only pre-1934 case presenting the issue now before the Court, the District of Columbia Court of Appeals assumed that, under a similar statute, if a defendant could plead guilty no death sentence could be imposed. *Green* v. *United States*, 40 App. D.C. 426, 427 (1913).

and accepted in *Seadlund* v. *United States*, 97 F.2d 742 (7th Cir. 1938). If a defendant pleads guilty, and the court accepts the plea, no sentencing jury may be convened and no death penalty imposed.

As the court below held, however, the above interpretation need not be accepted in order to find a substantial disparity in risk of death depending upon whether the defendant pleads guilty or demands a trial. As the Seventh Circuit said in *Seadlund, supra,* even if the court may convene a sentencing jury in a guilty plea case, it need not do so; the matter of convening a jury is entirely within the court's discretion. Of course, as *Seadlund* held and as the Government admits, if no jury is empaneled the judge cannot himself impose the death penalty. If anything is clear in the statute it is that the extreme penalty can be imposed only upon recommendation of a jury.[11]

Since it is within the discretion of the judge to empanel a jury to determine sentence in a guilty plea case, the court implied in *Seadlund* that it is also within the court's discretion to disregard a death recommendation when made by such a special jury. There are, therefore, two stages of absolute judicial discretion between the jury's recommendation of death and a sentence of death—that which exists before the jury is empaneled and that which survives even after the jury has made its recommendation.

The Government apparently accepts the interpretation of the statute immediately above (Brief, p. 13). It attempts to equate the risk of death assumed by the defendant who pleads not guilty, however, by urging that even where there is a trial, the judge is free not to submit the death penalty

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[11] Accord, *United States* v. *Dressler*, 112 F.2d 972, 980 (7th Cir. 1940).

issue to the jury, and equally free to disregard the jury's determination even though he decided in his discretion to submit the issue to the jury. In short, the role of the jury in the death sentence is advisory or precatory only. This reading of the statute is contrary to its language, its legislative history, and to virtually all judicial interpretations.

The statute says, in language as plain as language can be, that the defendant "shall be punished . . . . by death, . . . if the verdict of the jury shall so recommend." Congress could not have made its intent any clearer that the verdict of the jury is mandatory.

If the statutory language left any room for the interpretation urged by the Government, it would be removed by the legislative history. One reason asserted by the proponents of the provision was that it took the onus of inflicting death from the judge. 75 Cong. Rec. 13297. Yet the onus would remain with the judge if the sentencing power was really his and not the jury's. Moreover, in the House Report on this amendment to the act the provision was explained as having been added "to permit the jury to designate a death penalty for the kidnapper." H. Rep. No. 1457, 73d Cong., 2d Sess.

Construing a similar provision,[12] this Court said in *Winston* v. *United States,* 172 U.S. 303, 313 (1899), that

> "The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing exercise of this right; but commits the whole matter of

[12] The statute there in question provided that in all cases where the accused is found guilty of murder "the jury may qualify their verdict by adding thereto 'without capital punishment' " and whenever a verdict was so qualified the defendant "shall be sentenced to imprisonment at hard labor for life." 29 Stat. 487.

> its exercise to the judgment and the consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of the opinion that there are palliating or mitigating circumstances. But it extends to every case in which . . . the jury is of opinion that it would not be just or wise to impose capital punishment. [The factors to be considered] in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone."

In holding that a jury given authority to sentence must be unanimous both on the matter of sentence and on the question of guilt, this Court in *Andres* v. *United States,* 330 U.S. 740 (1947), also precluded an interpretation which would make the jury's determination advisory only.

Not only is the jury's determination of sentence in capital cases mandatory in most federal statutes authorizing submission of the issue to the jury, it is also mandatory in the great majority of States having similar provisions.[13] It has even been held that

> "The statute[14] clearly leaves to the jury the discretion as to whether capital punishment should be imposed in the event of conviction, even when the government announces at the outset, as it did here, that it will not request the death penalty. The choice of the govern-

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[13] Knowlton, *Problems of Jury Discretion in Capital Cases,* 101 U. of Pa. L. Rev. 1099, 1102 (1953).

[14] 21 U.S.C. §176b, which provides that one who furnishes heroin to another under the age of eighteen "shall suffer death if the jury in its discretion shall so direct."

> ment not to urge capital punishment cannot and does not detract one iota from the jury's power to direct the death penalty." *United States* v. *Romero,* 249 F.2d 371, 374 (2d Cir. 1957).

The interpretation urged by the Government is in the teeth of the statutory language, contrary to its legislative history, and against the great weight of judicial authority.[15] There is simply no room for such a construction.

When the defendant pleads guilty, therefore, either there is no possibility of a death sentence (if our interpretation is correct) or there is a possibility which is heavily muted by two levels of judicial discretion—the first, whether the judge shall empanel a jury; the second, whether he shall accept the jury's recommendation. When the defendant demands a jury trial, however, the judge's role in the sentencing decision is virtually non-existent. He cannot refuse to submit the issue to the jury, nor can he ignore the jury's decision to impose the death penalty. Indeed, he is forbidden even to instruct the jury on the criteria which they should employ in deciding whether to impose the death sentence. *Winston* v. *United States, supra.* The defendant who demands a trial puts his life on the line much more clearly than if he were to plead guilty.

It cannot be assumed that the judge, when he has discretion regarding the death penalty, is never going to exercise it in favor of the accused in a case where the jury would impose death. Indeed, judicial discretion whether to submit the penalty issue to a jury (in the guilty plea case) is quite likely to save the life of a defendant who

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[15] See also, *Williams* v. *United States,* 131 F.2d 21, 22 (C.A.D.C. 1942); *United States* v. *Willis,* 75 F. Supp. 628, 629 (D.D.C. 1948).

would have been executed had the matter gone to the jury. As the Chicago Jury Studies show, judges differ substantially from juries on the cases in which they regard the death penalty as appropriate. In a study of 111 cases in which juries found defendants guilty of capital crimes, and the judge agreed on guilt, the Chicago study found that juries imposed the death penalty in 19 per cent of the cases, while the judge agreed with the jury's death decision in only 13 per cent. Kalven and Zeisel, The American Jury 436-437 (1966). In the cases studied, therefore, if the penalty had been imposed only with the concurrence of the judge, six per cent of the defendants' lives would have been spared. Looking at the matter another way, the chances of a defendant avoiding the death penalty if the judge had to concur with the jury would have been improved in the cases studied by about 32%.[16] This hardly seems insubstantial.

Although the argument is probably superfluous, we contend that even if the Court were to accept the Government's invitation to rewrite §1201 to confer upon the judge the unbridled authority to refuse to submit the penalty issue to the trial jury and to disregard the jury's verdict if the issue were submitted, the procedural disparities in guilty plea cases and in cases tried would still be too substantial to pass constitutional muster. In the guilty plea case, the decision whether or not to convene a jury would normally be made on a skimpy record. There would be no witnesses exhibiting their injuries and describing the atrocities allegedly committed by the defendant. Common sense compels the conclusion that a judge would be less likely on such

[16] The probability of a death sentence would have been reduced from 19% to 13%, a reduction of about 32%.

a record to feel that the death penalty was appropriate than after the facts were graphically presented in court. On the other hand, when there is a trial on the merits, the judge has little time for calm reflection. Being human, he cannot help but be affected by the emotional, vengeful aura emanating from the witnesses and the spectators in the courtroom. Neither can he fail to be affected by his perceptions of the jury's reactions to the courtroom aura and the graphic descriptions and exhibitions by the witnesses. It is not fanciful to suggest that a judge is far more likely to submit the penalty issue to a jury if called upon to do so at trial than if the issue arises upon a guilty plea.[17]

Once the jury is empaneled, there are still differences that work to the prejudice of the accused who demanded a trial. Since the jury in a guilty plea case is determining only the penalty, the defendant is entitled to introduce any evidence mitigating the offense, and any evidence of his character and background which suggests the inappropriateness of the death penalty. He is probably not entitled to offer the same evidence in a trial upon the merits.[18] Even if he were legally entitled to present such evidence, he would often be prevented as a practical matter from doing so because it would be tantamount to a confession of guilt. He cannot seriously deny that he committed the crime and at the same time offer testimony explaining why he did it. Thus, since the issues to be decided by the jury in a trial are different in part from those to be decided when the

[17] *Cf.*, Comment, 66 Yale L.J. 204, 218 (1956) (Judges queried regarding lighter sentences for defendants pleading guilty noted that the plea often minimizes revelations of brutal circumstances which, if graphically brought out at trial, would increase the sentence imposed by the court).

[18] Knowlton, *supra*, note 13, at 1108-1117.

jury is convened only to decide penalty, the evidence offered will be substantially different, usually to the prejudice of the accused who demanded that the Government prove his guilt.

The arguments made by defense counsel will likewise differ depending upon whether the jury is also deciding guilt. Counsel is deterred from arguing extensively against the death penalty if he also holds hope of getting an acquittal. Any trial lawyer knows that jurors are not receptive to inconsistent arguments, *viz.*, "My client didn't commit the crime, but if you find otherwise, please be merciful." [19]

The disparate procedural contexts in which the evidence is adduced and the arguments made will not only have their effect upon the jury's verdict, which verdict will itself influence the judge, they will directly affect the judge's own evaluation of the propriety of the death penalty.

Whether the Court accepts the interpretation of the statute made by the court below, that argued for by Appellee, or that urged by the Government, therefore, there is no conceivable construction which will equalize the procedures for determining the death penalty in guilty and not guilty plea cases. Whatever the interpretation, the defendant who elects to stand on his Fifth and Sixth Amendment rights places his life in considerably greater danger than the defendant who waives those rights. The statute is plainly invalid.

Affirmance of the decision below will be a great stride toward eliminating the death penalty from American law. As such, it will be one of the most significant, humane, and sensible decisions of the decade. The death penalty will be

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[19] *Id.* at 1118-1120.

nudged toward extinction because the Congress and State legislatures will be compelled to take a fresh look at statutory provisions like §1201 which impose the death penalty in an impermissible manner. Responsibility for the continuance of the death penalty can no longer be laid to previous legislatures nor to public inertia and disinterest. No longer can legislators postpone reconsideration of the question while allegedly more pressing matters like taxes, lotteries, and legislative ethics fill up their time. If executions are to continue for many state and federal offenses they will have to be affirmatively reenacted. We are confident that in most legislatures they will not be.[20]

Even if the death penalty were reenacted for provisions like §1201, the procedures for imposing the penalty could hardly help but be more enlightened than the method employed in §1201. Not only does the present procedure permit the penalty to be imposed without full presentation of relevant evidence (because the determination of guilt is contemporaneous with sentencing), it leaves the matter to the unguided, unlimited discretion of twelve laymen. Such laymen are uninformed about the defendant's mental make up, his background, and his potentialities for rehabilitation. To ask them under such circumstances to determine whether the defendant lives or dies is to compel them to rely upon the one quality they come to court with—their sense of retribution, and thus to repudiate every penological advance of the past century.[21]

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[20] Most recent polls show a majority of those polled favor abolition. And see Sellin, The Death Penalty (1959).

[21] The evil is magnified by jury exemptions of some of the most enlightened members of the community (See Knowlton, *supra*, note 13 at 1131), and by disqualification of all those who have scruples against executions. See *United States* v. *Puff*, 211 F.2d 171, 182-186 (2d Cir. 1954), *cert. den.* 374 U.S. 963; Oberer, *Does Qualifica-*

Jury sentencing is a means by which judges and legislatures shirk responsibility for the executions which they authorize. Their ability to hide behind juries accounts in part for the persistence of the penalty despite widespread public opposition to it.

Even though in our opinion, and that of most commentators,[22] jury sentencing is an anachronism which should be abolished, nothing in the decision below compels such a result. Juries could still share in the sentencing decision, consistent with the Constitution, in two-stage trials, if a *new* jury were convened to determine sentence after *all* convictions (whether by trial or guilty plea). If juries determined sentence in every case, uncontaminated by the trial of guilt, we see no clear constitutional infirmity in such a procedure.[23]

III. The Entire Statute Was Correctly Held Invalid. If Not, the Entire Penalty Provision, Including That Part Which Authorizes a Term of Years or a Life Sentence, Is Invalid.

Assuming *arguendo* the soundness of the Government's assumption that it might be appropriate to consider sever-

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tion of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?, 39 Texas L. Rev. 545 (1961).

[22] Knowlton, *supra*, note 13, at 1130; LaFont, *Assessment of Punishment—A Judge or Jury Function?* 38 Texas L. Rev. 835 (1960); Webster, *Jury Sentencing—Grab-bag Justice*, 14 Sw. L.J. 221 (1960); Comment, *Jury Sentencing in Virginia*, 53 Va. L. Rev. 968 (1967).

[23] Provided the jury is not given *carte blanche* to impose death. If no guidance or standards are given the jury, the procedure would be subject to attack for vagueness and as cruel and unusual punishment. See Defendant Jackson's Memorandum in Support of Motion to Dismiss. (R. 8-13.)

ing the death penalty provision of the statute and leaving the remainder intact (Brief, p. 13), it by no means follows that such a decision in this case would be good law or sound policy. Nor does the undeniable fact that "Congress resolutely intended to make interstate transportation of kidnaped persons a federal crime" (Brief, p. 14) provide a touchstone for decision. Even if the appropriate test for severability is whether Congress would have enacted alone the constitutional part of the statute, the entire statute should fall.[24]

The Government would have the Court return the Kidnaping Act to substantially its original form, providing a maximum penalty of life or an unlimited term of years for all persons transporting kidnaped persons across state lines. Yet the fact that Congress promptly amended the statute, changing it drastically, sharply undercuts the assumption that in 1934, when it amended the Act, Congress intended that if the amendment were held invalid the original Act should stand, or that Congress would now entertain such an intent. The 1934 Amendment did not merely increase the penalties for kidnaping; it changed the whole thrust of the Act. There is substantial evidence that the provision of the death penalty for defendants whose victims were not "liberated unharmed" was designed to encourage kidnapers to refrain from killing their victims to avoid detection and conviction.[25] Without this provision,

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[24] In both the cases cited by the Government, *Champlin Rfg. Co.* v. *Commission*, 286 U.S. 210, 234; and *United States* v. *Harriss*, 347 U.S. 612, 627, the statutes in question contained express severability clauses. Where, as here, there is no severability clause, the presumption is against severance. *Electric Bond Co.* v. *Comm.*, 303 U.S. 419, 434, and cases cited.

[25] See *Robinson* v. *United States*, 324 U.S. 282, 284; Bowmar, *The Lindbergh Law*, 1 Law and Cont. Prob. 435, 440 (1934);

which alone distinguishes the penalties applicable to those who do and those who do not harm or kill their victims, a kidnaper will be more strongly tempted to compound his crime by murder than if some distinction were made. Given the evidence of Congressional concern with this problem, and that it was resolved in favor of drawing the distinction, it is doubtful that Congress would intend for the statute to stand absent such a feature. This is even clearer now when all the States have anti-kidnaping laws and when there are several other provisions of the U.S. Code which justify federal investigative jurisdiction in kidnaping cases.[26] Complete invalidation of the law is quite unlikely to permit a kidnaper to escape detection and punishment, but likely to avoid giving him an incentive to murder his victim.

Given these considerations, plus the settled presumption against severability when there is no severability clause,[27] the court below was correct in holding the whole statute invalid. There are, moreover, other practical considerations pointing in the same direction. The only way in which a defendant facing the constitutionally impermissible choice thrust upon him by a statute such as §1201 can fully protect himself is to challenge the validity of the statute *before trial* by moving to dismiss the indictment. Yet unless the

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Keenan, *New Weapons for the War on Kidnapers*, N.Y. Times, May 20, 1934.

[26] See, *e.g.*, 18 U.S.C. §241 (conspiracy to injure or intimidate person in exercise of any right or privilege secured to him by the Constitution or laws of the United States), §875 (transmission or communication of a ransom demand or threat to kidnap), §1073 (flight to avoid prosecution), §1202 (receipt or possession of ransom money or other property), §2312 (transportation of stolen vehicle), §2314 (transportation of stolen goods).

[27] *Electric Bond Co.* v. *Comm.*, *supra*, note 24.

statute is held invalid or nugatory, there is no ground for dismissing the indictment. Thus, if the lower court is reversed for dismissing count one of the indictment, even though the penalty provision is unconstitutional, defendants in the future will have no feasible way to challenge such provisions at a time—before entry of a final plea—when prejudice to their cause may be averted. Total invalidity, therefore, is part and parcel of an essential remedy for unconstitutional penalties of the type contained in §1201.

Even if the Court disagrees with the above argument, the lower court's decision should be affirmed, for the Government's assumption that the death penalty provision is the only constitutionally offensive part of the statute is in error. The only inoffensive segment of the statute is that portion which proscribes the transportation of kidnaped persons across state lines. Yet this proscription, standing by itself, cannot support count one of the indictment because it contains no penalty and is therefore nugatory.

The death penalty provision of §1201 in and by itself does not impair the exercise of defendant's Fifth and Sixth Amendment rights. Were death the only penalty provided in the statute, its presence would not encourage defendants to plead guilty or threaten them if they demanded trial by jury. The death penalty provision and the clause which provides for imprisonment for a term or life together constitute the unlawful inducement. Together, one is a carrot and the other a stick. Separately, neither is either. The penalty provision as an integrated whole provides the inducement to forego constitutional rights. The entire penalty provision is therefore constitutionally offensive and should be stricken.[28] Since this leaves only the bare pro-

[28] *Cf. Weems* v. *United States*, 217 U.S. 349, 381.

scription which might be considered severable, and since there is apparently no omnibus provision in the U.S. Code prescribing penalties for crimes for which the penalties are not specified, the first count of the indictment was properly dismissed and the decision should be affirmed even if the inoffensive provision is considered severable.[29]

Conclusion

The judgment of the district court should be affirmed.

Respectfully submitted,

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October, 1967

[29] We assume that whether the Court holds the entire statute or merely the penalty provision invalid, since the infringement is against procedural rights, the Court is free to limit the retroactive effect of the judgment. *Linkletter* v. *Walker*, 381 U.S. 618; *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406; *Johnson* v. *New Jersey*, 384 U.S. 719.

SUPREME COURT, U. S.

NOV 9 1967

JOHN F. DAVIS, CLERK

No. 85

In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES JACKSON ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

1. Appellees' claim is that the penalty provisions of the Kidnaping Act place a burden on the constitutional right to trial by jury and tend to coerce a plea of guilty. From the premise—which is undeniably correct—that a jury recommendation of capital punishment is a precondition of its imposition, they reason as follows: By pleading guilty or waiving jury trial, the defendant escapes all risk that capital punishment will be imposed, whereas by standing on his right to jury trial he places his life in the jury's hands. Therefore, there is an inducement to forego jury trial in order to escape capital punishment.

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As explained in our opening brief, our primary response is that this Court need not reach the question whether a statutory scheme which created such an inducement not to contest in full measure would be unconstitutional. It is our submission that the likelihood of capital punishment is not materially affected by whether the defendant elects to be tried by jury.[1] Our argument on this point has two branches:

a. A defendant cannot, merely by attempting to plead guilty or to waive trial by jury, prevent imposition of capital punishment. The judge—as appellees concede—is perfectly free to refuse a guilty plea or jury waiver (F.R. Crim. P., Rules 11, 23(a)); and this is not infrequently done. Moreover, a judge who thought that he might be prepared to concur in the imposition of capital punishment if a jury so recommended would presumably feel obliged to secure the opinion of a jury on that question.

If, in such a case, the judge felt that a full trial would be inappropriate because guilt was conceded, he could accept the plea of guilty but then convene a

[1] Even if some element of inducement were thought to exist, it would not follow that the statute is unconstitutional. We distinguished *Griffin* v. *California*, 380 U.S. 609, as a case where the burden upon a constitutional right was the direct product of oppressive governmental action. In the instant case, as in the case of pleas to lesser offenses, any inducement not to contest guilt in full measure is the incidental and perhaps unavoidable consequence of a procedure designed not to discourage the assertion of constitutional rights, but to make punishment more flexible and less harsh. Certainly that is true of a statute like the Kidnaping Act which makes a jury recommendation a prerequisite to imposing the death penalty, precluding its imposition by the judge without such a recommendation.

jury for purposes of punishment. This practice has been followed in States having penalty provisions similar to those in the Kidnaping Act and by federal judges under the Kidnaping and Bank Robbery Acts (see our opening brief, pp. 11–12, notes 8 and 9). To our knowledge, its use has been rarely challenged, and never successfully (see *Seadlund* v. *United States*, 97 F. 2d 742, 748 (C.A. 7)).[2]

b. By electing trial by jury, the defendant in a Kidnaping Act case does not, in our view of the statute, subject himself to a materially greater risk of receiving a death sentence than had he sought to plead guilty or to waive jury trial. In the latter case, as noted above, the judge will presumably refuse the plea or convene a jury for punishment if he believes that a death sentence might be warranted. In the former case, the judge's view will also be controlling, because the jury's recommendation of capital punishment is not binding upon the judge.

Appellees press for a rigorous construction of the statute which would make the jury's recommendation of the death penalty conclusive. Their approach, seemingly, is that if the statute is construed with sufficient rigor, there may be more of a foothold for mounting a constitutional attack upon it. We see no compulsion to give the statute the reading they urge, especially in light of the precept that statutes are, wherever possible, to be construed so as to avoid, not engender,

[2] That a jury may determine the degree of an offense or the measure of punishment in a criminal case involving a plea of guilty is not a recent concept. See *Hallinger* v. *Davis*, 146 U.S. 314, rejecting the claim that due process *requires* the States to adopt such a procedure.

constitutional questions. Certainly, the statute is far less unequivocal than appellees contend. It does not provide that the defendant shall be punished by death in the discretion of the jury, but, rather, that the defendant shall be punished either by death or, if the death penalty is not imposed, by imprisonment. A necessary condition of punishment by death is that the jury "so recommend." It does not follow that that is a sufficient condition. Advisory juries and jury recommendations are a commonplace of legal procedure (see, *e.g.*, F.R. Civ. P. 39(c)). To view the jury recommendation of death as only advisory serves to mitigate the harshness of jury sentencing—a practice which appellee Jackson strongly criticizes as confiding the issue of life or death "to the unguided, unlimited discretion of twelve laymen"; as "repudiat[ing] every penological advance of the past century"; as "a means by which judges and legislatures shirk responsibility for the executions which they authorize"; and finally as "an anachronism which should be abolished" (Jackson brief, pp. 25–26). It is in keeping with the so-called rule of lenity, and it gives effect to the word "recommend", which in its ordinary usage certainly imports that the person to whom the recommendation is made (here, the sentencing judge) has the power to deviate as well as to follow.[3]

[3] Appellees question application of the rule of lenity to the 1934 Act on the ground that it was that Act which added the possibility of an enhanced penalty. Our point, however, is that the rule comes into play in deciding how the death penalty may be imposed. Congress obviously rejected the most drastic possibilities—a mandatory sentence of death or a sentence of death except where the jury affirmatively provides otherwise (see the

But even if we were to assume, *arguendo,* with appellees, (a) that the jury's recommendation of the death penalty is binding on the court and (b) that this creates an unconstitutional inducement to forego trial by jury (either on the premise that the judge may fail to convene a jury to consider the question of punishment, or that he lacks power to do so), it still would not follow that the answer would be to hold the statute unconstitutional, either in whole or in part. If it be assumed that Congress indeed intended the jury to be the sole determinant of the question of punishment, does it not follow that, in every case, the district court should impanel a jury to determine punishment or—if it be further assumed that the only jury which may determine punishment is the jury that considers the issue of guilt—refuse to accept a waiver of jury trial or plea of guilty? Certainly, it is the prerogative of the courts under the Criminal Rules to reject such waivers and pleas. It would also seem to be their duty to accommodate criminal procedures to the statutory scheme contemplated by Congress. This Court, in the exercise of its supervisory powers, could direct that course. It is the course, we note, which the State of Washington has formally adopted in implementing a similar statute making a jury recommendation of capital punishment prerequisite to its

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federal murder statute, 18 U.S.C. 1111). Concededly, the legislative history is not conclusive on the question whether judge and jury would have to concur before capital punishment might be imposed. We argue simply that the requirement of concurrence is a reasonable interpretation of the statute and of its history; that it is in keeping with the traditional role of the federal judge; and that the rule of lenity favors its adoption.

imposition. Rev. Code of Wash. Ann. (1961), §§ 9.48.030, 10.01.060, 10.49.010. The more lenient view of the statute, and the one we urge, is that the jury's recommendation on the issue of punishment is simply a recommendation and not a mandate. We do stress, however, that the issues posed by this case admit of reasonable solutions which avoid rather than create constitutional doubts.

2. We revert briefly to the question whether the entire Act fails if—contrary to our submission—the capital-penalty provision of the Kidnaping Act is invalid. Appellees argue that the provision cannot be severed because Congress failed to include an express provision for severability. However, it has never been the rule that an express severability clause is necessary to avoid total invalidation of a statute where only one of its provisions offends. *Champlin Rfg. Co.* v. *Commission,* 286 U.S. 210, was indeed a case where the legislature had provided for severing any invalid provision, but in stating the correct test the Court did not mention that fact. It stated, rather: "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Id.* at 234. And the Court then cited for this proposition cases where it had severed invalid provisions in the absence of any provision for severability. *Pollock* v. *Farmers' Loan & Trust Co.,* 158 U.S. 601, 635; *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U.S. 362, 395–396; *Field* v. *Clark,* 143 U.S. 649, 695–696.

Under the test of *Champlin*—whether Congress would have enacted the Kidnaping Act without the capital-penalty provisions here challenged—it is plain that the provision is severable. It was added by amendment two years after the original act was passed, and, appellees to the contrary notwithstanding, it is evident from a comparison of the original and amended acts that the amendment effected no substantial change in the scheme of the original act—save to add the possibility of the death penalty.[4] It is quite inconceivable

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[4] The original Act, 47 Stat. 326, provided:

> That whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward shall, upon conviction, be punished by imprisonment in the penitentiary for such term of years as the court, in its discretion, shall determine * * *.

As amended, 48 Stat. 781, the Act provided:

> Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed; or (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by

that the 1934 Congress which decided to authorize the imposition of capital punishment in aggravated cases of kidnaping would have chosen to discard the entire statute if advised that it could not go beyond the maximum penalty (life imprisonment) provided by the 1932 enactment. The fundamental reason which prompted the so-called Lindbergh Law, in 1932—the fact that state lines had proved an obstacle to effective police work and to securing witnesses—was no less compelling two years later when the statute was strengthened. See, generally, Bomar, *The Lindbergh Law*, 1 Law and Contemporary Problems 435 (1934).

3. It remains only to note an issue that is not in this case. Appellee Jackson urges (Jackson Brief, pp. 24–25): "Affirmance of the decision below will be a great stride toward eliminating the death penalty from American law. As such, it will be one of the most significant, humane, and sensible decisions of the decade. The death penalty will be nudged toward extinction * * *." But the question whether the death penalty should be abolished is not before this Court, and it is a legislative rather than a judicial issue. Indeed, it is wholly extraneous to the present case, since appellee Jackson concedes that, if the only pen-

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imprisonment in the penitentiary for such term of years as the court in its discretion shall determine * * *."

Plainly, the addition of the provision for capital punishment was the only substantial change in the relevant portion of the Act. (The omitted portions in the above quotations define interstate commerce and punish conspiracies to kidnap. These provisions were unchanged in the 1934 amendment, save that a provision was added creating a presumption of interstate transportation where the kidnaped individual is not liberated within seven days of the kidnaping.)

alty prescribed by Congress for violations of the Kidnaping Act were death, none of the constitutional questions here presented would arise (Jackson brief, p. 29).

In stressing the irrelevance here of views as to the wisdom of capital punishment, we intimate no approbation of the practice. The Department of Justice is on record as favoring the abolition of the death penalty. See Letter from Ramsey Clark, Deputy Attorney General, to John L. McMillan, Chairman, District of Columbia Committee, House of Representatives, July 23, 1965, in re H.R. 559. Our point is merely that the question is one for Congress, not for the courts.

Respectfully submitted.

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No. 85

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES JACKSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF AMICUS CURIAE OF DANA ANDREW HILL

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BRIEF AMICUS CURIAE OF DANA ANDREW HILL

INTEREST OF AMICUS CURIAE

Amicus Dana Andrew Hill stands indicted under the District of Columbia rape statute, D.C. Code § 22-2801. The District of Columbia rape statute reads:

> "Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years: Provided, That in any case of rape the jury may add to their verdict, if it be guilty, the

> words 'with the death penalty,' in which case the punishment shall be death by electrocution: Provided further, That if the jury fail to agree as to the punishment the verdict of guilty shall be received and the punishment shall be imprisonment as provided in this section." D.C. Code Ann. § 22-2801 (1967).

Amicus Hill moved the United States District Court for the District of Columbia to dismiss the indictment against him on the grounds that the statute on which the indictment is based is unconstitutional as violative of both the Sixth and Fifth Amendments of the United States Constitution. The motion was denied November 3, 1967. Amicus Hill has noted an appeal from this decision.*/

The District of Columbia rape statute is similar in its terms to the Federal Kidnaping Act.**/ The decision of this

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*/ Amicus believes he has a right to take such interlocutory appeal since otherwise he would suffer irreparable injury. DiBella v. United States, 369 U.S. 121 (1962). Stack v. Boyle, 342 U.S. 1 (1951).

**/ "Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise,

Court will perforce have a great effect on the final determination whether the District statute is unconstitutional. The Solicitor General of the United States, in his initial brief to this Court, indicated that if the Federal Kidnaping Act falls the District of Columbia rape statute is also vulnerable.*/

Amicus Hill, therefore, has a critical interest in the outcome of this case. Upon the Court's decision may rest his life. He consequently submits this brief as amicus curiae in support of Appellees Charles Jackson, John A. Walsh, and Glenn W.A. De La Motte.

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except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed." 18 U.S.C. 1201(a) (1964).

*/ Brief of the Solicitor General, pp. 4-5

ARGUMENT

Amicus Hill does not intend to recount the appellees' discussions of the authorities which ably establish the principle that the exercise of a constitutional right may not be made costly.*/ Instead Amicus wishes to focus on the operation of the District of Columbia rape statute and by analogy and comparison assist this Court in its interpretation and evaluation of the Federal Kidnaping Act. Amicus would demonstrate to this Court how, by reason of the language of the statute, the decisions interpreting it, and the practice under it, the District statute impairs the free exercise of the right to jury trial and tends to coerce a guilty plea. Amicus would further point out that, although the District statute is more explicit and the alternatives under it more clearly drawn, the two statutes are essentially the same and demand similar interpretation.

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*/ Amicus would, however, point to that line of cases, not yet brought to the attention of this Court, which indicates that a waiver of the Sixth Amendment right to jury trial will not be accepted unless it is clear that the waiver is a free, express, and intelligent choice. E.g., Patton v. United States, 281 U.S. 276 (1930), Adams v. United States ex rel McCann, 317 U.S. 269 (1942). Certainly, in light of such precedent, a statute which places the risk of death on a defendant who chooses jury trial must be viewed askance.

The District statute declares that the death penalty shall be imposed only if the jury adds to their guilty verdict the words, "with the death penalty." If a defendant chooses jury trial the death penalty becomes a possibility. If he pleads guilty (or nolo contendere) or waives jury trial, he can be sentenced to no more than thirty years. The defendant, therefore, is posed a vexing alternative by the statute -- forego jury trial or risk death.

The alternative is a real one both in theory and in practice. Information obtained from the Administrative Office of the United States Courts, Division of Procedural Studies and Statistics, attached as Exhibit "A", indicates that out of 268 cases, arising under D.C. Code § 22-2801 for the fiscal years 1957-1966, the plea of guilty to the indictment (or nolo contendere) has been accepted in 26 cases, or 9.7 percent of the total number of cases. The same statistics show that trial has been had to the Court during these years in 28 cases, or 10.4 percent of the total number of cases under the statute.*/

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*/ Considering the greatly overloaded criminal docket in the District Court in the District of Columbia, it is to be expected that a judge, insofar as justice will permit, will desire to handle cases as expeditiously as possible. Resolution of a case by guilty plea or trial to the Court, therefore, is desirable from the standpoint of judicial administration.

These statistics remove the constitutional question from the realm of mere speculation and make it a live, practical problem requiring resolution.

Whether the statute is constitutionally infirm was first discussed by the United States Court of Appeals for the District of Columbia in Green v. United States, 40 U.S. App. D.C. 426 (1913).

> "Would a legislature have a constitutional right to penalize an accused person for pleading not guilty? . . . Could any court in such circumstances ever have any assurance that a plea of guilty was a voluntary plea? If a judge should say to the accused, 'If you plead guilty, I will give you a lighter sentence than I shall give you if you plead not guilty, and are convicted,' what would be the result? Any sentence passed upon a plea of guilty thus obtained would be set aside . . . . [I]f we hold that [Congress] has offered the accused a reward for pleading guilty, or threatened him with a severer punishment if he shall require the case to be proved against him, then we must hold that the provision is unconstitutional and void as violating the [Sixth] Amendment. . . . For how can one be said to be left in the free enjoyment of a jury trial

when the statute subjects him to a severer punishment on being found guilty by a jury than when he is adjudged guilty on his own plea?" 40 U.S. App. D.C. at 429-430.

However, rather than declare the statute unconstitutional, the Court gave it the tortuous interpretation of requiring a jury trial in every instance regardless of whether the defendant wished to plead guilty or have trial to the Court. The constitutional issue was thus avoided.

This interpretation robbed the criminal process of much of its flexibility. To remedy this flaw, Judge Holtzoff in United States v. Willis, 75 F. Supp. 628 (D.D.C. 1948) declared he felt the Green opinion should be limited to the precise issue involved*/ and held that a trial judge in his discretion could accept a plea of guilty under the statute.

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*/ The issue presented in Green was whether a defendant had a right to insist that his guilty plea be accepted. Willis concerned the question whether a judge had discretion to accept a guilty plea. Judge Holtzoff did not deal expressly with the constitutional issue. He did not fully consider the dilemma raised in Green that, if the defendant can plead guilty, the statute impairs the free exercise of his right to jury trial and tends to coerce a guilty plea.

Judge Holtzoff's opinion in Willis has held sway in the District of Columbia.*/ As the statistics prove, the district judges no longer require a jury trial in every instance but permit resolution of cases under the statute both by guilty plea and by trial to the Court. The constitutional dilemma laid to rest, albeit awkwardly, in Green has been resurrected. Resolution of the constitutional question is aided by a careful examination of the situation both when a defendant pleads guilty or pleads not guilty and waives jury trial, and when he chooses jury trial. Such examination demonstrates that the statute runs afoul of constitutional principles.

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*/ In McCoy v. United States, 363 F.2d 306 (C.A.D.C. 1966), the Court of Appeals approved, as a general proposition, the statement in Willis that, "[t]he power of a court to accept a guilty plea is traditional and fundamental. Its existence is necessary for the purpose of serving the practical ends of the administration of the criminal law." 363 F.2d at 307. There was no ruling in McCoy specifically concerning D.C. Code § 22-2801.

I. The Situation If The Defendant Pleads Guilty or Pleads Not Guilty and Waives Jury Trial

We have seen that rape cases in the District of Columbia are resolved in over 20 percent of all instances by a guilty plea or by trial to the Court. If a case is so disposed of, the risk of death is completely avoided.

Even if it may be possible, after a plea of guilty or a conviction on trial to the Court, for a judge to impanel a jury for sentencing purposes, it is clear beyond any doubt from the wording of the D.C. Code § 22-2801 that such jury cannot impose the death sentence. The District of Columbia rape statute says:

> "The jury may add to their verdict, if it be guilty, the words 'with the death penalty.'" (Emphasis supplied.)

The statute explicitly declares that only the jury which has rendered the guilty verdict may impose the death penalty. There would be no way for a jury impaneled only for sentencing to add to their verdict the words "with the death penalty." A jury impaneled only for sentencing under D.C. Code § 22-2801 has no power to order the death penalty.*/

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*/ Furthermore, as a practical matter, juries are not impaneled for sentencing under D.C. Code § 22-2801. No case where this has been done under this statute has been found.

The upshot of this discussion is that a plea of guilty or a request for trial to the Court is a very real way of avoiding the possibility of the death sentence under the District rape statute. If a guilty plea is offered, there is a good chance that it will be accepted. If trial to the Court is requested, there is a good chance

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In the Willis case, Judge Holtzoff quoted with approval from Seadlund v. United States, 97 F.2d 742 (7th Cir. 1938), which declared that, concerning the Federal Kidnaping Act, a jury could be impaneled only for sentencing and could return a valid sentence of death. Judge Holtzoff went on to comment that, "No reason applies for placing a different interpretation on the parallel provisions in the local statute relating to rape and carnal knowledge and in the federal statute relating to kidnapping." 75 F. Supp. at 631. However, as just demonstrated there is a very good reason why a jury impaneled for sentencing under the District of Columbia statute cannot give the death sentence. The words in the statute simply do not permit it. Judge Holtzoff's dictum appears to be only a comment in passing and he does not specifically deal with the wording of the statute. This dictum should be compared with a statement made by Judge Holtzoff earlier in his opinion:

> "Consequently, by pleading guilty the defendant escapes the risk of being sentenced to death." 75 F. Supp. at 629.

that it will be granted. If either a guilty plea is accepted or trial to the Court granted, there is no possibility that the death penalty will result. The way to avoid the death penalty presented to the defendant is a real and viable one -- a lure to the defendant who, with justification, views jury trial with trepidation.

The Kidnaping Act, while not as explicit as the District of Columbia rape statute, requires a similar interpretation. The Kidnaping Act speaks of the "verdict of the jury," clearly indicating that only the jury which has determined guilt can recommend the death sentence.

II. The Situation If The Defendant Chooses Jury Trial

On the other hand, the defendant has the alternative of choosing jury trial. But if he does, there is always the possibility that the jury can impose the death penalty.

If the death penalty is imposed by the jury, the trial judge has no discretion under D.C. Code § 22-2801 to upset the sentence. The statute says:

> "Provided, that in any case of rape the jury may add to their verdict if it be guilty, the words 'with the death penalty,' in which case the punishment

shall be death by electrocution." (Emphasis supplied.)

The conclusion that the trial judge has no power to mitigate the death sentence under this statute is further compelled by the language of several cases concerning D.C. Code § 22-2801. In Tatem v. United States, 190 F.2d 612 (C.A.D.C. 1951), the Court of Appeals said:

> "The death sentence . . . was within 'the sound discretion of the jury and of the jury alone.'" 190 F.2d at 618.

In Williams v. United States, 131 F.2d 21 (C.A.D.C. 1942), the Court said:

> ". . . [D]efendant's counsel was at a loss to understand why upon this set of facts the jury returned the death penalty. Many persons probably would not have done so. This jury did. Congress has seen fit to give that power to the jury. There is nothing a trial or appellate court can do to reverse its judgment in inflicting the death penalty when there is sufficient evidence to support a verdict of guilty." 131 F.2d at 22.

Judge Holtzoff, in United States v. Willis, supra, came to the same conclusion:

> "If the jury so recommends, it becomes mandatory on the court to impose a death penalty." 75 F. Supp. at 629.

As the cases demonstrate, if the defendant chooses jury trial he throws himself on the mercy of the jury and the jury alone concerning the death sentence. The trial judge has no discretion to tamper with a death sentence. The trial judge's discretion having been removed, the hazard of requesting jury trial becomes greater. Consequently, the impairment of the defendant's free exercise of his constitutional right to jury trial and the tendency to coerce a guilty plea are even more pronounced.*/

It is again apparent that the language of the statute and the case law pertaining thereto in regard to the judge's discretion to mitigate the death sentence are clearer concerning the District rape statute than in regard to the Federal Kidnaping Act. But it strains the language of the Kidnaping Act to place a different interpretation on it than that compelled by both language and decision concerning the District statute. The Kidnaping Act says "shall be punished" and the word "recommend" does not ameliorate the mandatory character of the statute. The import of the

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*/ The defendant's reticence in choosing jury trial will be heightened when he realizes that individuals with scruples against capital punishment often will be disqualified from jury duty and that, consequently, he is likely to get a "hanging jury" -- i.e., one composed of persons having no reluctance to imposing the death sentence.

Act as a whole is that the jury which imposes death has the final word. The life of the defendant is subject to jury fiat.

CONCLUSION

The language of the District of Columbia rape statute and the decisions and practice concerning it are instructive in considering the constitutionality of the Federal Kidnaping Act. The two statutes are essentially the same and should receive similar interpretations. Both statutes present a defendant with a treacherous choice -- a choice "between the rock and the whirlpool"*/ - which makes costly the exercise of constitutional rights. Both statutes violate the Sixth and Fifth Amendments of the United States Constitution.

Amicus asks this Court to declare the Federal Kidnaping Statute unconstitutional and to do so in terms which indicate that the District of

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*/ See Garrity v. New Jersey, 386 U.S. 493 (1967).

Columbia rape statute also exceeds the bounds of constitutional permissibility.

Respectfully submitted,

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EXHIBIT A

United States District Court for the District of Columbia

Criminal Defendants Disposed of for Violations of Title 22, D.C. Code, Section 2801 (Rape), by Type of Disposition, Fiscal Years 1957 thru 1966

Fiscal year	Total defendants	Total not convicted	Dismissed	Acquitted by Court	Acquitted by Jury	Total convicted	Plea of guilty or nolo contendere	Convicted by Court	Convicted by Jury
1957	19	11	8	-	3	8	4	-	4
1958	14	9	8	-	1	5	3	1	1
1959	25	18	6	-	12	7	3	-	4
1960	30	20	6	4	10	10	3	-	7
1961	27	23	7	6	10	4	1	-	3
1962	32	20	12	3	5	12	2	-	10
1963	22	6	6	-	-	16	4	1	11
1964	35	23	13	3	7	12	5	2	5
1965	33	31	23	5	3	2	-	-	2
1966	31	23	11	3	9	8	1	-	7

Source: Administrative Office of the United States Courts
Division of Procedural Studies and Statistics, Sept. 20, 1967.

SUPREME COURT OF THE UNITED STATES

No. 85.—October Term, 1967.

United States, Appellant, v. Charles Jackson et al.	On Appeal From the United States District Court for the District of Connecticut.

[April 8, 1968.]

Mr. Justice Stewart delivered the opinion of the Court.

The Federal Kidnaping Act, 18 U. S. C. § 1201 (a), provides:

> "Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnaped . . . and held for ransom . . . or otherwise . . . shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed."

This statute thus creates an offense punishable by death "if the verdict of the jury shall so recommend." The statute sets forth no procedure for imposing the death penalty upon a defendant who waives the right to jury trial or upon one who pleads guilty.

On October 10, 1966, a federal grand jury in Connecticut returned an indictment charging in count one that three named defendants, the appellees in this case, had transported from Connecticut to New Jersey a person who had been kidnaped and held for ransom, and who had been harmed when liberated.[1] The District Court

[1] Count one:

"On or about September 2, 1966, CHARLES JACKSON, also known as 'Batman,' also known as 'Butch'; and GLENN WALTER ALEXANDER DE LA MOTTE; and JOHN ALBERT WALSH, JR., the defendants herein, did knowingly transport in

dismissed this count of the indictment,[2] holding the Federal Kidnaping Act unconstitutional because it makes "the risk of death" the price for asserting the right to jury trial, and thereby "impairs . . . free exercise" of that constitutional right.[3] The Government appealed directly to this Court,[4] and we noted probable jurisdiction.[5] We reverse.

We agree with the District Court that the death penalty provision of the Federal Kidnaping Act imposes an impermissible burden upon the exercise of a constitutional right, but we think that provision is severable from the remainder of the statute. There is no reason to invalidate the law in its entirety simply because its capital punishment clause violates the Constitution. The District Court therefore erred in dismissing the kidnaping count of the indictment.

I.

One fact at least is obvious from the face of the statute itself: In an interstate kidnaping case where the victim has not been liberated unharmed, the defendant's assertion of the right to jury trial may cost him his life, for the federal statute authorizes the jury—and only the jury—to return a verdict of death. The Government

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interstate commerce from Milford in the District of Connecticut to Alpine, New Jersey, one John Joseph Grant, III, a person who had theretofore been unlawfully seized, kidnapped, carried away and held by the defendants herein, for ransom and reward and for the purpose of aiding the said defendants to escape arrest, and the said John Joseph Grant, III, was harmed when liberated, in violation of Title 18, United States Code, Section 1201 (a)."

[2] Count two, charging transportation of a stolen motor vehicle from Connecticut to New York in violation of 18 U. S. C. § 2312, has not been challenged and is not now before us.

[3] 262 F. Supp. 716, 718.

[4] 18 U. S. C. § 3731.

[5] 387 U. S. 929.

does not dispute this proposition. What it disputes is the conclusion that the statute thereby subjects the defendant who seeks a jury trial to an *increased* hazard of capital punishment. As the Government construes the statute, a defendant who elects to be tried by a jury cannot be put to death even if the jury so recommends—unless the trial judge agrees that capital punishment should be imposed. Moreover, the argument goes, a defendant cannot avoid the risk of death by attempting to plead guilty or waive jury trial. For even if the trial judge accepts a guilty plea or approves a jury waiver, the judge remains free, in the Government's view of the statute, to convene a special jury for the limited purpose of deciding whether to recommend the death penalty. The Government thus contends that, whether or not the defendant chooses to submit to a jury the question of his guilt, the death penalty may be imposed if and only if both judge and jury concur in its imposition. On this understanding of the statute, the Government concludes that the death penalty provision of the Kidnaping Act does not operate to penalize the defendant who chooses to contest his guilt before a jury. It is unnecessary to decide here whether this conclusion would follow from the statutory scheme the Government envisions,[6] for it is not in fact the scheme that Congress enacted.

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[6] Even if the Government's interpretation were sound, the validity of its conclusion would still be far from clear. As the District Court observed, "even if the trial court has the power to submit the issue of punishment to a jury, that power is discretionary, its exercise uncertain." 262 F. Supp. 716, 717–718. The Government assumes that a judge who would accept the death penalty recommendation appended to a jury verdict of guilt is a judge who would exercise his discretionary power to convene a penalty jury if the defendant were to plead guilty or submit to a bench trial. But the mere fact that a judge would defer to the jury's recommendation hardly implies that he would take the extraordinary step of convening a penalty jury after accepting a plea of guilty or approving

At the outset, we reject the Government's argument that the Federal Kidnaping Act gives the trial judge discretion to set aside a jury recommendation of death. So far as we are aware, not once in the entire 34-year history of the Act has a jury's recommendation of death been discarded by a trial judge.[7] The Government would apparently have us assume either that trial judges have always agreed with jury recommendations of capital punishment under the statute—an unrealistic assumption at best[8]—or that they have abdicated their statutory duty to exercise independent judgment on the issue of penalty. In fact, the explanation is a far simpler one. The statute unequivocally states that, "if the verdict of the jury shall so recommend," the defendant "shall be punished . . . by death . . . ." The word is "shall," not "may."[9] In acceding without exception to jury recom-

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a waiver of jury trial. Even if the Government's statutory position were correct, the fact would remain that the defendant convicted on a guilty plea or by a judge completely escapes the threat of capital punishment unless the trial judge makes an affirmative decision to commence a penalty hearing and to impanel a special jury for that purpose, whereas the defendant convicted by a jury automatically incurs a risk that the same jury will recommend the death penalty and that the judge will accept its recommendation.

[7] One district judge has indicated that he would not feel bound by a jury recommendation of death in a kidnaping case, see *Robinson* v. *United States*, 264 F. Supp. 146, 151–153, but the question was not directly before him since the case involved a petition for post-conviction relief by a prisoner who had been tried by a jury and sentenced to life imprisonment. Although federal juries have recommended capital punishment in a number of kidnaping cases, counsel for the Government stated at oral argument in this Court that he was aware of no case in which such a recommendation had been set aside.

[8] See Kalven & Zeisel, The American Jury 436–444 (1966).

[9] The Government notes that the word "shall" precedes *both* alternative punishments: The offender "shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment. . . ." But the notion that judicial discretion is thereby

mendations of death, trial judges have simply carried out the mandate of the statute.

The Government nonetheless urges that we overlook Congress' choice of the imperative. Whatever might have been assumed in the past, we are now asked to construe the statute so as to eliminate the jury's power

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authorized is dispelled by the qualification attached to the second alternative: "by imprisonment . . . *if the death penalty is not imposed.*" Although it is true that the judge rather than the jury is formally responsible for imposing sentence in a federal criminal case, those qualifying words would state a pointless truism unless they were meant to refer to the jury's recommendation: The offender "shall be punished (1) by death . . . if the verdict of the jury shall so recommend, or (2) by imprisonment" if the jury's verdict does *not* so recommend. To accept the Government's reading of the statute would make its final phrase a complete redundancy, anomalous indeed in a statute that Congress has twice pruned of excess verbiage. See 18 U. S. C. A. § 1201 (1966 ed.), p. 113, Historical and Revision Notes.

Nothing in the language or history of the Federal Kidnaping Act points to any such result. On the contrary, an examination of the death penalty provision in its original form demonstrates that Congress could not have intended the meaning the Government now seeks to attribute to it. For the statute as it stood in 1934 provided that the offender "shall, upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, or (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment in the penitentiary for such term of years as the court in its discretion shall determine . . . ." 48 Stat. 781. In this form, the statutory language simply will not support the interpretation that the offender "shall be punished by death *or* by imprisonment" if the jury recommends the death penalty. For the statute in this form makes unmistakably clear that, if the death penalty applies—*i. e.*, if the jury has recommended death—then the punishment *shall* be death unless, before the judge has imposed sentence, the victim has been liberated unharmed. There is absolutely no reason to think that the purely formal transformations through which the statute has passed since 1934 were intended to alter this basic penalty structure.

to fix the death penalty without the approval of the presiding judge. "[T]his reading," it is said, would conform "to the long tradition that makes the trial judge in the federal courts the arbiter of the sentence." And so it would. The difficulty is that Congress intentionally discarded that tradition when it passed the Federal Kidnaping Act. Over the forcefully articulated objection that jury sentencing would represent an unwarranted departure from settled federal practice,[10] Congress rejected a version of the Kidnaping Act that would have left punishment to the court's discretion [11] and instead chose an alternative that shifted from a single judge to a jury of 12 the onus of inflicting the penalty of death.[12] To accept the Government's suggestion that the jury's sentencing role be treated as merely advisory would return to the judge the ultimate duty that Congress deliberately placed in other hands.

The thrust of the clause in question was clearly expressed by the House Judiciary Committee that drafted it: Its purpose was, quite simply, "to permit the jury to *designate* a death penalty for the kidnaper." [13] The

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[10] See 75 Cong. Rec. 13288, 13295–13297 (1932).

[11] As originally drafted, the Kidnaping Act had provided for punishment "by death or imprisonment . . . for such term of years as the court in its discretion shall determine . . . ." 75 Cong. Rec. 13288 (1932).

[12] A number of Congressmen feared that empowering judges to impose capital punishment might make some jurors unduly reluctant to convict. See 75 Cong. Rec. 13289, 13294 (1932). To the extent that this concern was responsible for the decision to require a jury recommendation of death as a prerequisite to the imposition of capital punishment, it is of course immaterial whether or not the jury's recommendation is binding on the trial judge. But, as the Government concedes, many of the Congressmen who favored jury determination of the death penalty did so largely because such a scheme would take from the judge the onus of inflicting capital punishment. See, *e. g.*, 75 Cong. Rec. 13297.

[13] H. R. Rep. No. 1457, 73d Cong., 2d Sess., 2 (1934) (emphasis added).

fact that Congress chose the word "recommend" to describe what the jury would do in designating punishment cannot obscure the basic congressional objective of making the jury rather than the judge the arbiter of the death sentence. The Government's contrary contention cannot stand.

Equally untenable is the Government's argument that the Kidnaping Act authorizes a procedure unique in the federal system—that of convening a special jury, without the defendant's consent, for the sole purpose of deciding whether he should be put to death. We are told initially that the Federal Kidnaping Act authorizes this procedure by implication. The Government's reasoning runs as follows: The Kidnaping Act permits the infliction of capital punishment whenever a jury so recommends. The Act does not state in so many words that the jury recommending capital punishment must be a jury impaneled to determine guilt as well. Therefore the Act authorizes infliction of the death penalty on the recommendation of a jury specially convened to determine punishment. The Government finds support for this analysis in a Seventh Circuit decision construing the Federal Kidnaping Act to mean that the death penalty may be imposed whenever "an affirmative recommendation [is] made by a jury," including a jury convened solely for that purpose after the court has accepted a guilty plea. *Seadlund* v. *United States*, 97 F. 2d 742, 748. Accord, *Robinson* v. *United States*, 264 F. Supp. 146, 153. But the statute does not say "a jury." It says "*the* jury." At least when the defendant demands trial by jury on the issue of guilt, the Government concedes that "the verdict of the jury" means what those words naturally suggest: the general verdict of conviction or acquittal returned by the jury that passes upon guilt or innocence. Thus, when such a jury has been convened, the statutory reference is to that jury alone, not to a jury impaneled after convic-

tion for the limited purpose of determining punishment.[14] Yet the Government argues that, when the issue of guilt has been tried to a judge or has been eliminated altogether by a plea of guilty, "the verdict of the jury" at once assumes a completely new meaning. In such a case, it is said, "the verdict of the jury" means the recommendation of a jury convened for the sole purpose of deciding whether the accused should live or die.

The Government would have us give the statute this strangely bifurcated meaning without the slightest indication that Congress contemplated any such scheme. Not a word of the legislative history so much as hints that a conviction on a plea of guilty or a conviction by a court sitting without a jury might be followed by a separate sentencing proceeding before a penalty jury. If the power to impanel such a jury had been recognized elsewhere in the federal system when Congress enacted the Federal Kidnaping Act, perhaps Congress' total silence on the subject could be viewed as a tacit incorporation of this sentencing practice into the new law. But the background against which Congress legislated was barren of any precedent for the sort of sentencing procedure we are told Congress impliedly authorized.

The Government nonetheless maintains that Congress' failure to provide for the infliction of the death penalty upon those who plead guilty or waive jury trial was no more than an oversight that the courts can and should correct. At least twice, Congress has expressly authorized the infliction of capital punishment upon defendants convicted without a jury,[15] but even on the assumption

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[14] If the jury's verdict of guilt includes no death penalty recommendation, the judge can impose no penalty beyond imprisonment. He cannot convene another jury to recommend capital punishment. See *United States* v. *Dressler*, 112 F. 2d 972, 980.

[15] In a statute forbidding the wrecking of trains, Congress provided that "[w]hoever is convicted of any such crime, which has resulted

that the failure of Congress to do so here was wholly inadvertent, it would hardly be the province of the courts to fashion a remedy. Any attempt to do so would be fraught with the gravest difficulties: If a special jury were convened to recommend a sentence, how would the penalty hearing proceed? What would each side be required to show? What standard of proof would gov-

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in the death of any person, shall be subject . . . to the death penalty . . . if the jury shall in its discretion so direct, *or, in the case of a plea of guilty, if the court in its discretion shall so order.*" 62 Stat. 794 (1948), 18 U. S. C. § 1992 (1951 ed.) (emphasis added). And in a statute prohibiting the destruction of aircraft, Congress provided that violators whose conduct causes death "shall be subject . . . to the death penalty . . . if the jury shall ~~in its~~ discretion so direct, *or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order.*" 70 Stat. 540 (1956), 18 U. S. C. § 34 (Supp. 1966) (emphasis added).

The language of the aircraft-wrecking statute, 18 U. S. C. § 34, is of particular interest here because it reflects a congressional awareness of the precise problem the Government suggests Congress overlooked in the kidnaping area: In a letter addressed to the Chairman of the House Committee on Interstate and Foreign Commerce, William P. Rogers, then Deputy Attorney General, suggested on behalf of the Justice Department that the bill then under consideration should be amended by the addition of the phrase "or in the case of a plea of not guilty where the defendant has waived trial by jury." The letter stated:

"Under the present phraseology it is doubtful whether the court could invoke the death penalty in a situation where the defendant has entered a plea of not guilty, waived his right to a trial by jury, and asked to be tried by the court." 2 U. S. Code Congressional and Administrative News, 84th Cong., 2d Sess., 3149–3150 (1956).

Congress inserted the suggested language in the aircraft statute as enacted on July 14, 1956. Less than a month later, Congress reconsidered the Kidnaping Act and added a technical amendment, 70 Stat. 1043 (1956), but included no provision to authorize the imposition of the death penalty upon defendants who plead guilty or waive the right to jury trial.

ern? To what extent would conventional rules of evidence be abrogated? What privileges would the accused enjoy? Congress, unlike the state legislatures that have authorized jury proceedings to determine the penalty in capital cases,[16] has addressed itself to none of these questions.[17]

It is one thing to fill a minor gap in a statute—to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality. We recognize that trial judges sitting in federal kidnaping cases have on occasion chosen the latter course, attempting to fashion on an *ad hoc* basis the ground rules for penalty proceedings before a jury.[18] We do not know what kinds of rules particular federal judges have adopted, how widely such rules have varied, or how fairly they have been applied. But one thing

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[16] See Cal. Penal Code § 190.1 (Supp. 1966); Conn. Gen. Stat. § 53–10 (Supp. 1965); Pa. Stat. Ann., Tit. 18, § 4701 (1963); N. Y. Penal Law §§ 125.30, 125.35 (1967).

[17] The complex problems presented by separate penalty proceedings have frequently been noted. See, *e. g.*, *Frady* v. *United States*, 348 F. 2d 84, 115–116 (Burger, J., concurring in part and dissenting in part); Note, The California Penalty Trial, 52 Cal. L. Rev. 386 (1964); Note, The Two-Trial System in Capital Cases, 39 N. Y. U. L. Rev. 50 (1964). See also Kuh, A Prosecutor Considers the Model Penal Code, 63 Col. L. Rev. 608, 615 (1963). It is not surprising that courts confronted with such problems have concluded that their solution requires "comprehensive legislative and not piecemeal judicial action." *State* v. *Mount*, 30 N. J. 195, 224 (concurring opinion). See also *People* v. *Friend*, 47 Cal. 2d 749, 763, n. 7. But see *United States* v. *Curry*, 358 F. 2d 904, 914–915.

[18] The Government informs us that at least three of the defendants who pleaded guilty in cases arising under the Federal Kidnaping Act have been sentenced to death on the recommendation of special penalty juries convened to determine punishment.

at least is clear: Individuals forced to defend their lives in proceedings tailor-made for the occasion must do so without the guidance that defendants ordinarily find in a body of procedural and evidentiary rules spelled out in advance of trial.[19] The Government notes with approval "the decisional trend which has sought . . . to place the most humane construction on capital legislation." Yet it asks us to extend the capital punishment provision of the Federal Kidnaping Act in a new and uncharted direction, without the compulsion of a legislative mandate and without the benefit of legislative guidance. That we decline to do.

II.

Under the Federal Kidnaping Act, therefore, the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die. Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury. The inevitable effect of any such

[19] Even in States with legislatively established jury proceedings on the penalty issue, defense attorneys have not always been prepared to take advantage of those features of the penalty trial designed to benefit their clients. See Note, Executive Clemency in Capital Cases, 39 N. Y. U. L. Rev. 136, 167 (1964). If the relative novelty of penalty proceedings has thus impaired effective representation in jurisdictions where the contours of such proceedings have been fixed by statute, it seems clear that the difficulties for the defense would be even more formidable under the amorphous case-by-case system that the Government asks us to legitimize today. It is no wonder that the Second Circuit, while not foreclosing two-stage trials altogether, was "loath to compel unwilling defendants to submit" to them. *United States* v. *Curry*, 358 F. 2d 904, 914.

provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty [20] and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional. But, as the Government notes, limiting the death penalty to cases where the jury recommends its imposition does have another objective: It avoids the more drastic alternative of mandatory capital punishment in every case. In this sense, the selective death penalty procedure established by the Federal Kidnaping Act may be viewed as ameliorating the severity of the more extreme punishment that Congress might have wished to provide.[21]

The Government suggests that, because the Act thus operates "to mitigate the severity of punishment," it is irrelevant that it "may have the incidental effect of inducing defendants not to contest in full measure." [22] We cannot agree. Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. Cf. *United States* v. *Robel*, 389 U. S. 258; *Shelton* v. *Tucker*, 364 U. S. 479, 488–489. The question is not whether the chilling effect is "incidental" rather than intentional; the question is whether that effect is unnecessary and therefore excessive. In this case the answer to

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[20] It is established that due process forbids convicting a defendant on the basis of a coerced guilty plea. See, *e. g.*, *Herman* v. *Claudy*, 350 U. S. 116.

[21] See *United States* v. *Curry*, 358 F. 2d 904, 913–914 and n. 8. See also *Andres* v. *United States*, 333 U. S. 740, 753–754 (Frankfurter, J., concurring).

[22] See *McDowell* v. *United States*, 274 F. Supp. 426, 431. See also *Laboy* v. *New Jersey*, 266 F. Supp. 581, 585.

that question is clear. The Congress can of course mitigate the severity of capital punishment. The goal of limiting the death penalty to cases in which a jury recommends it is an entirely legitimate one. But that goal can be achieved without penalizing those defendants who plead not guilty and demand jury trial. In some States, for example, the choice between life imprisonment and capital punishment is left to a jury in *every* case—regardless of how the defendant's guilt has been determined.[23] Given the availability of this and other alternatives, it is clear that the selective death penalty provision of the Federal Kidnaping Act cannot be justified by its ostensible purpose. Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnaping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right. See *Griffin* v. *California*, 380 U. S. 609.[24]

It is no answer to urge, as does the Government, that federal trial judges may be relied upon to reject coerced pleas of guilty and involuntary waivers of jury trial. For the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right. Thus the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon

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[23] See, *e. g.*, Rev. Code Wash. Ann. §§ 9.48.030, 10.01.060, 10.49.010 (1956 ed.). Cf. Cal. Penal Code § 190.1 (Supp. 1966).

[24] In an opinion by Justice Zenoff, *Spillers* v. *State*, 436 P. 2d 18, 22–23, the Supreme Court of Nevada has recently held unconstitutional a state penalty scheme imposing capital punishment for forcible rape resulting in great bodily injury "if the jury by their verdict affix the death penalty." Nev. Rev. Stat. § 200.360 (1) (1963 ed.).

their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily.[25] The power to reject coerced guilty pleas and involuntary jury waivers might alleviate, but it cannot totally eliminate, the constitutional infirmity in the capital punishment provision of the Federal Kidnaping Act.

The Government alternatively proposes that this Court, in the exercise of its supervisory powers, should simply instruct federal judges sitting in kidnaping cases to reject all attempts to waive jury trial and all efforts to plead guilty, however voluntary and well-informed such attempted waivers and pleas might be. In that way, we could assure that every defendant charged in a federal court with aggravated kidnaping would face a possible death penalty, and that no defendant tried under the federal statute would be induced to forego a constitutional right. But of course the inevitable consequence of this "solution" would be to force all defendants to submit to trial, however clear their guilt and however strong their desire to acknowledge it in order to spare themselves and their families the spectacle and expense of protracted courtroom proceedings. It is true that a defendant has no constitutional right to insist that he be tried by a judge rather than a jury, *Singer* v. *United States*, 380 U. S. 24, and it is also true "that a criminal defendant has [no] absolute right to have his guilty plea accepted by the court." *Lynch* v. *Overholser*, 369 U. S.

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[25] See *Laboy* v. *New Jersey*, 266 F. Supp. 581, 584. So, too, in *Griffin* v. *California*, 380 U. S. 609, the Court held that comment on a defendant's failure to testify imposes an impermissible penalty on the exercise of the right to remain silent at trial. Yet it obviously does not follow that every defendant who ever testified at a pre-*Griffin* trial in a State where the prosecution could have commented upon his failure to do so is entitled to automatic release upon the theory that his testimony must be regarded as compelled.

705, 719. But the fact that jury waivers and guilty pleas may occasionally be rejected hardly implies that all defendants may be required to submit to a full-dress jury trial as a matter of course. Quite apart from the cruel impact of such a requirement upon those defendants who would greatly prefer not to contest their guilt, it is clear—as even the Government recognizes—that the automatic rejection of all guilty pleas "would rob the criminal process of much of its flexibility." As one federal court has observed: [26]

> "The power of a court to accept a plea of guilty is traditional and fundamental. Its existence is necessary for the . . . practical . . . administration of the criminal law. Consequently, it should require an unambiguous expression on the part of the Congress to withhold this authority in specified cases."

If any such approach should be inaugurated in the administration of a federal criminal statute, we conclude that the impetus must come from Congress, not from this Court. The capital punishment provision of the Federal Kidnaping Act cannot be saved by judicial reconstruction.

III.

The remaining question is whether the statute as a whole must fall simply because its death penalty clause is constitutionally deficient. The District Court evidently assumed that it must, for that court dismissed the kidnaping indictment. We disagree. As we said in *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 234:

> ". . . The unconsitutionality of a part of an Act does not necessarily defeat . . . the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions

[26] *United States* v. *Willis*, 75 F. Supp. 628, 630.

> which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." [27]

Under this test, it is clear that the clause authorizing capital punishment is severable from the remainder of the kidnaping statute and that the unconstitutionality of that clause does not require the defeat of the law as a whole. See *McDowell* v. *United States*, 274 F. Supp. 426, 429. Cf. *Spillers* v. *State*, 436 P. 2d 18, 23–24.

The clause in question is a functionally independent part of the Federal Kidnaping Act. Its elimination in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation. Under such circumstances, it is quite inconceivable that the Congress which decided to authorize capital punishment in aggravated kidnaping cases would have chosen to discard the entire statute if informed that it could not include the death penalty clause now before us.[28]

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[27] The appellees correctly note that *Champlin* was a case where Congress had included a clause expressly authorizing the severance of any invalid provision, a fact upon which this Court relied in recognizing "a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained . . . ." 286 U. S. 210, 235. But whatever relevance such an explicit clause might have in creating a presumption of severability, see *Electric Bond Co.* v. *Comm'n*, 303 U. S. 419, 434, the ultimate determination of severability will rarely turn on the presence or absence of such a clause. Thus, for example, the Court in *Champlin*, after stating the basic test quoted above, cited cases in which invalid statutory provisions had been severed despite the absence of any provision for severability. *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, 635; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 395–396; *Field* v. *Clark*, 143 U. S. 649, 695–696.

[28] As this Court observed in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 396, "it is not to be presumed that the legislature was legislating for the mere sake of imposing penalties, but the penalties . . . were simply in aid of the main purpose of the statute. They may fail, and still the great body of the statute

In this case it happens that history confirms what common sense alone would suggest: The law as originally enacted in 1932 contained no capital punishment provision.[29] A majority of the House had favored the death penalty but had yielded to opposition in the Senate as a matter of expediency.[30] Only one Congressman had expressed the view that the law would not be worth enacting without capital punishment.[31] The majority

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have operative force, and the force contemplated by the legislature in its enactment."

[29] The original Federal Kidnaping Act, 47 Stat. 326, provided:

"That whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward shall, upon conviction, be punished by imprisonment in the penitentiary for such term of years as the court, in its discretion, shall determine . . . ."

[30] The Senate Judiciary Committee had opposed capital punishment and had reported the kidnaping law in a version that authorized no penalty beyond "imprisonment . . . for such term of years as the court, in its discretion, shall determine." S. Rep. No. 765, 72d Cong., 1st Sess., 2 (1932); 75 Cong. Rec. 11878 (1932). In the ensuing debates, some members of the House opposed the death penalty on principle. 75 Cong. Rec. 13285, 13289–13290, 13294 (1932). Others argued that the threat of capital punishment would encourage kidnapers to kill their victims lest their testimony lead to conviction and execution. *Id.*, at 13285, 13304. Most favored the death penalty in some form, see *id.*, at 13283–13284, 13286–13287, 13295, but feared that efforts to persuade the Senate to accept a capital punishment provision would occasion further delay and might cause ultimate defeat. *Id.*, at 13288, 13299, 13303. The majority therefore compromised their views and accepted the Senate version of the bill. *Id.*, at 13304. See Bomar, The Lindbergh Law, 1 Law and Contemp. Prob. 435, 440 (1934).

[31] Congressman Dyer of Missouri had stated that without the death penalty "the legislation would not be worth anything, because every State now has a kidnaping law and few of them provide the death penalty." 75 Cong. Rec. 13287 (1932).

obviously felt otherwise.[32] When the death penalty was added in 1934, the statute was left substantially unchanged in every other respect.[33] The basic problem that had prompted enactment of the law in 1932—the

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[32] Congressman Cochran of Missouri, who had introduced the original bill (H. R. 5657) with a death penalty clause, stressed that his objective was the prompt enactment of a federal kidnaping law; to that end, he was "willing to go along and strike out the death penalty." 75 Cong. Rec. 13296 (1932); see also *id.*, at 13284, 13299, 13304. Congressman LaGuardia of New York put the matter succinctly: "[I]f what Congress is looking for is a headline, leave the death penalty in; but if we are looking for a real bill that will be a deterrent to kidnaping, take the Senate bill. [Applause.]" *Id.*, at 13299. Shortly thereafter, the House passed the Senate version of the Act. *Id.*, at 13304.

[33] By 1934, the Senate's attitude toward capital punishment had changed markedly. In that year the Senate passed a bill (S. 2841) authorizing punishment "by imprisonment for not less than 10 years, or by death" for killing or kidnaping in connection with a bank robbery. 78 Cong. Rec. 5738 (1934). The House Judiciary Committee amended the Senate provision to its present form, see 18 U. S. C. § 2113 (e) (1951 ed.), limiting the death penalty to those cases where "the verdict of the jury shall so direct." H. R. Rep. No. 1461, 73d Cong., 2d Sess., 1 (1934).

The House Judiciary Committee had not forgotten that its attempt to include similar language in the Kidnaping Act of 1932, see H. R. Rep. No. 1493, 72d Cong., 1st Sess., 1 (1932), had been defeated "in the rush to draft and enact a [kidnaping] bill suitable to both houses before adjournment." Finley, The Lindbergh Law, 28 Geo. L. J. 908, 914, n. 24 (1940). Taking its cue from the bank robbery legislation, the House Committee found an ideal opportunity to reassert its 1932 position in a Senate Bill (S. 2252) that had begun as a technical amendment to the 1932 Kidnaping Act. See 78 Cong. Rec. 5737 (1934). In S. 2252, the Senate retained the basic punishment of "imprisonment in the penitentiary for such term of years as the court, in its discretion, shall determine," see n. 29, *supra*, but the House Judiciary Committee added the alternative penalty of "death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the

difficulty of relying upon state and local authorities to investigate and prosecute interstate kidnaping [34]—had not vanished during the intervening two years. It is therefore clear that Congress would have made interstate kidnaping a federal crime even if the death penalty provision had been ruled out from the beginning. It would

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court if, prior to its imposition, the kidnaped person has been liberated unharmed . . . ." H. R. Rep. No. 1457, 73d Cong., 2d Sess., 1 (1934); 78 Cong. Rec. 8127–8128 (1934).

After initial disagreement in the Senate, *id.*, at 8263–8264, and a conference, *id.*, at 8322; H. R. Rep. No. 1595, 73d Cong., 2d Sess. (1934), the Senate accepted the House addition to S. 2252 without debate, 78 Cong. Rec. 8767, 8775, 8778, 8855–8857 (1934), and the resulting statute, 48 Stat. 781 (1934), employed substantially the same language as that now appearing in 18 U. S. C. § 1201 (a). As amended in 1934, the Federal Kidnaping Act, 48 Stat. 781, thus provided:

"Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, or (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment in the penitentiary for such term of years as the court in its discretion shall determine . . . ."

[34] In late 1931 the American public became seriously concerned about the mounting incidence of professional kidnaping and the apparent inability of state and local authorities to cope with the interstate aspects of the problem. See Fisher & McGuire, Kidnapping and the So-Called Lindbergh Law, 12 N. Y. U. L. Q. 646, 652–653 (1935). Because of its geographical position, the city of St. Louis "had experienced numerous kidnapings in which the handicap of state lines had hindered or defeated her police officers."

be difficult to imagine a more compelling case for severability.

In an effort to suggest the contrary, the appellees insist that the 1934 amendment "did not merely increase the penalties for kidnaping; it changed the whole thrust of the Act." They note that Congress deliberately limited capital punishment to those kidnapers whose victims are not liberated unharmed. Such a differential penalty provision, the appellees argue, is needed to discourage kidnapers from injuring those whom they abduct.[35] The

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Bomar, The Lindbergh Law, 1 Law & Contemp. Prob. 435 (1934). Largely in response to this experience, Senator Patterson and Congressman Cochran, both of Missouri, introduced identical bills (S. 1525, H. R. 5657) in the House and Senate, 75 Cong. Rec. 275, 491 (1931), forbidding the transportation in interstate or foreign commerce of any person "kidnaped . . . and held for ransom or reward, or . . . for any other unlawful purpose." Several months after the kidnaping of the Lindbergh baby in March 1932, Congress enacted the first Federal Kidnaping Act, see n. 29, *supra*, a slightly modified version of the bills introduced by Patterson and Cochran.

[35] See Bomar, The Lindbergh Law, 1 Law & Contemp. Prob. 435, 440 and n. 36. One might legitimately doubt the ability of the death penalty clause to achieve this supposed objective. In that regard, it has been observed that "[t]he advantage to the kidnapper in killing his victim is obvious and immediate, for the [Government's] best witness, perhaps its whole case, will be put out of the way. Thus a sentence of life imprisonment instead of death may not suffice to induce a kidnapper to refrain from killing his victim, even if the kidnapper is aware of the mitigation provision—itself a supposition not always true." Note, A Rationale of the Law of Kidnapping, 53 Col. L. Rev. 540, 550 (1953).

Moreover, as this Court has interpreted the statute, the death penalty may be imposed so long as "the kidnapped person . . . was still suffering from . . . injuries when liberated." *Robinson* v. *United States*, 324 U. S. 282, 285. As a result, "[o]nce [an] injury has taken place, the inducement held out by the statute necessarily is either to hold the victim until cure is effected or to do away with him so that evidence, both of the injury and of the kidnapping, is destroyed." *Id.*, at 289 (Rutledge, J., dissenting).

appellees contend that, without its capital punishment clause, the Federal Kidnaping Act would not distinguish "the penalties applicable to those who do and those who do not harm or kill their victims." Stressing the obvious congressional concern for the victim's safety, they conclude that "it is doubtful that Congress would intend for the statute to stand absent such a feature." This argument is wrong as a matter of history, for Congress *enacted* the statute "absent such a feature." [36] It is wrong as a matter of fact, for the length of imprisonment imposed under the Act can obviously be made to reflect the kidnaper's treatment of his victim. And it is wrong as a matter of logic, for nothing could more completely obliterate the distinction between "the penalties applicable to those who do and those who do not harm or kill their victims" than the total invalidation of *all* the penalties provided by the Federal Kidnaping Act—the precise result sought by the appellees.

Thus the infirmity of the death penalty clause does not require the total frustration of Congress' basic purpose—that of making interstate kidnaping a federal crime. By holding the death penalty clause of the Federal Kidnaping Act unenforceable, we leave the statute an operative whole, free of any constitutional objection.

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[36] Congress was certainly aware when it passed the original Kidnaping Act of 1932 that "[t]he victim may be murdered or slain" if the kidnaper "has nothing to gain by [keeping] the victim . . . alive." 75 Cong. Rec. 13285 (1932). Such considerations might have been influential in the omission of any death penalty provision in 1932, see *Robinson* v. *United States*, 324 U. S. 282, 289, n. 4 (Rutledge, J., dissenting), but not a single member of Congress even hinted that the anti-kidnaping law should be defeated altogether in the interest of the victim's safety. Given the law's fundamental objective of preventing interstate kidnaping in the first instance, any such suggestion would have been unthinkable.

The appellees may be prosecuted for violating the Act, but they cannot be put to death under its authority.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 85.—October Term, 1967.

United States, Appellant, v. Charles Jackson et al.	On Appeal From the United States District Court for the District of Connecticut.

[April 8, 1968.]

Mr. Justice White, with whom Mr. Justice Black joins, dissenting.

The Court strikes down a provision of the Federal Kidnaping Act which authorizes only the jury to impose the death penalty. No question is raised about the death penalty itself or about the propriety of jury participation in its imposition, but confining the power to impose the death penalty to the jury alone is held to burden impermissibly the right to a jury trial because it may either coerce or encourage persons to plead guilty or to waive a jury and be tried by the judge. In my view, however, if the vice of the provision is that it may interfere with the free choice of the defendant to have his guilt or innocence determined by a jury, the Court needlessly invalidates a major portion of an Act of Congress. The Court itself says that not every plea of guilty or waiver of jury trial would be influenced by the power of the jury to impose the death penalty. If this is so, I would not hold the provision unconstitutional but would reverse the judgment, making it clear that pleas of guilty and waivers of jury trial should be carefully examined before they are accepted, in order to make sure that they have been neither coerced nor encouraged by the death penalty power in the jury.

Because this statute may be properly interpreted so as to avoid constitutional questions, I would not take the first step toward invalidation of statutes on their face because they arguably burden the right to jury trial.